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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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164 pp

TABLE OF CONTENTS

		Page
Appendix A	(Court of Appeals opinion dated 8/30/84 as amended 1/29/85)	1a
Appendix B	(Court of Appeals opinion dated 7/29/82)	26a
Appendix C	(Court of Appeals opinion dated 8/7/79)	36a
Appendix D	(Court of Appeals opinion dated 7/26/77)	88a
Appendix E	(District Court opinion dated 5/20/83)	119a
Appendix F	(District Court amended order dated 8/12/80)	139a
Appendix G	(District Court order dated 8/8/80)	144a
Appendix H	(District Court transcript of Motion to Dismiss dated 5/12/76)	149a
Appendix I	(District Court order Suppressing Evidence dated 3/31/76)	152a
Appendix J	(Judgment dated 1/18/85)	158a
Appendix K	(Court of Appeals order dated 1/8/85)	160a
Appendix L	(Chronology of Proceedings)	161a

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 83-3067

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, aka KAMOOK BANKS, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the District of Oregon

Argued and Submitted Jan. 4, 1984

Decided Aug. 30, 1984

[As Amended Jan. 29, 1985]

Before WALLACE and CANBY, Circuit Judges, and CRAIG, District Judge.*

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* The Honorable Walter Early Craig, Senior United States District Judge for the District of Arizona, sitting by designation.

CANBY, Circuit Judge:

This is the third interlocutory appeal arising from the government's efforts to prosecute these defendants. Although it has been more than eight years since defendants were originally arrested and indicted, they still have not been brought to trial so that their guilt or innocence may be determined. We are now asked to decide whether the delay in bringing defendants to trial has violated their constitutional right to a speedy trial.

I.

The facts giving rise to the present charges and the first two appeals in this case are adequately set forth in our two previous opinions. *See United States v. Banks*, 682 F.2d 841, 842-44 (9th Cir. 1982), *cert. denied*, 459 U.S. 1117, 103 S.Ct. 755, 74 L.Ed.2d 972 (1983); *United States v. Loud Hawk*, 628 F.2d 1139, 1141-43 (9th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 917, 100 S.Ct. 1279, 63 L.Ed.2d 602 (1980). We merely summarize them here.

Defendants were arrested on November 14, 1975, after being stopped by the Oregon State Police on the basis of information supplied by the FBI. A search of defendants' vehicles pursuant to a valid search warrant uncovered several firearms, a quantity of what police believed to be dynamite, and apparatus for the manufacture of time bombs. Rather than preserving the dynamite or transferring it to a place of safekeeping, the state authorities decided to destroy it without notification to defendants.

On December 22, 1975, a federal grand jury returned a five-count superseding indictment. The first three counts related to defendants' alleged possession of dynamite (the dynamite counts), and the fourth

and fifth charged defendants with unlawful possession of firearms (the nondynamite counts). Prior to trial, defendants successfully moved for suppression of any evidence relating to the destroyed dynamite. The government sought immediate review of the suppression order under 18 U.S.C. § 3731. The district court, however, denied the government's request for a continuance to permit it to pursue its appeal of the suppression order, and ordered that trial proceed as scheduled on May 12, 1976. When the day for trial arrived, the government announced it was not ready. Because of the unwillingness of the government to proceed to trial, the district court, acting pursuant to Fed. R. Crim. P. 48(b), dismissed the indictment with prejudice for unnecessary delay. The government filed its notice of appeal in open court on the same day.

We consolidated the two appeals, and a panel of this court initially affirmed the dismissal. However, at the instance of the government, we voted to take the appeal en banc and reversed the suppression order. In analyzing the propriety of the district court's order dismissing the indictment, we examined the dynamite counts and the nondynamite counts separately. As to the former, we held that the delay necessitated by the government's appeal of the suppression order had not been "unnecessary" for purposes of Rule 48(b). *United States v. Loud Hawk*, 628 F.2d at 1149-50. Rather, we reasoned that the delay was necessary to the meaningful exercise of the government's statutory right to appeal the suppression order. As to the nondynamite counts, however, we held that the delay had been "unnecessary" because the suppression of evidence relating to dynamite had nothing to do with the nondynamite

charges, which could have proceeded to trial. *Id.* at 1150. Nevertheless, we decided that dismissal of the nondynamite counts *with prejudice* was inappropriate because the government had not been forewarned that dismissal with prejudice would result from a failure to proceed with the prosecution. *Id.* at 1151. Accordingly, we ordered denial of defendants' motion to suppress, reinstatement of the dynamite counts, and reconsideration of the dismissal of the nondynamite counts insofar as the dismissal was with prejudice. Following denial of certiorari, our mandate issued on March 12, 1980, three years and ten months after the indictment had been dismissed by the district court and appeal taken therefrom by the government.

On remand, the district court, at the urging of defendants, ruled that the nondynamite counts could not simply be reinstated. Consequently, the government was compelled to go back before the grand jury and seek a second superseding indictment. The indictment which resulted was returned on June 18, 1980. It again charged defendants with four of the five original counts in the first superseding indictment and in addition charged defendants with three new counts. The addition of these new counts precipitated a defense motion to dismiss the indictment for vindictive prosecution. On August 8, 1980, the district court granted the motion as to KaMook Banks and dismissed all counts in the indictment pertaining to her. The motion as to the other defendants, however, was denied. The government appealed the dismissal as to KaMook Banks, and the other defendants appealed the denial of the motion as to them. We reversed the dismissal as to KaMook Banks, except that we upheld the dismissal of the added count; we ordered all but the added count reinstated. *United*

States v. Banks, 682 F.2d at 846. As to the other defendants, we dismissed the appeal for lack of jurisdiction. *Id.* at 844. We denied defendant's request for rehearing, and the Supreme Court refused certiorari. Our mandate issued on January 31, 1983, two years, five months after appeal was taken from the district court's order and seven years, two months, and seventeen days after defendants were arrested.

Trial was rescheduled to being on April 11, 1983. The government, however, successfully obtained a continuance, over the objection of defendants, until May 3, 1983. Subsequently, the court on its own motion continued the trial date until May 23, 1983. The trial was then rescheduled for June 13, 1983, for reasons not known to this court. Defendants objected to each of these continuances.

On March 21, 1983, the defendants moved for dismissal on the ground that the delay in bringing them to trial violated their right to a speedy trial guaranteed by the sixth amendment. By order of May 20, 1983, the district court granted defendants' motion and dismissed the indictment with prejudice. It concluded that the appropriate period within which to assess whether defendants had been denied their speedy trial right was the entire ninety-one month period between November 14, 1975 when defendants were arrested and June 13, 1983 when trial was finally set to begin. It reasoned that the entire period of delay should be analyzed under the speedy trial clause of the sixth amendment, rather than under the due process clause of the fifth amendment, because at all times during this period defendants were "accused" persons. Finding that the majority of the delay in this case was attributable to the two interlocutory appeals, the district court concluded that the

seventy-five months consumed by the two appeals must be weighed against the government. Moreover, it found that defendants had adequately asserted their right to a speedy trial, and that they had been prejudiced by having to live with unresolved criminal charges for more than seven and one-half years and by impairment of their ability to defend themselves.

II.

Although the right to a speedy trial asserted by defendants is "one of the most basic rights preserved by our Constitution," *Klopfer v. North Carolina*, 386 U.S. 213, 226, 87 S.Ct. 988, 995, 18 L.Ed.2d 1 (1967), no per se test has been devised to determine when the right has been violated. Instead, we must apply a rather flexible "functional approach" that attempts to give proper weight to the various interests at stake. *Barker v. Wingo*, 407 U.S. 514, 522, 92 S.Ct. 2182, 2187, 33 L.Ed.2d 101 (1972). The primary factors to be considered are the length of the delay, the reasons for the delay, the degree to which defendants asserted their right to a speedy trial, and the extent of prejudice to the defendants caused by the delay. *Id.* at 530-33, 92 S.Ct. at 2191-93.

A. Length of Delay

In order to determine the length of delay for sixth amendment purposes, we must know when to begin counting and when, if ever, to interrupt counting. It is clear enough that the speedy trial clause does not apply "before a defendant is indicted, arrested, or otherwise officially accused." *United States v. MacDonald*, 456 U.S. 1, 6 (1982) (citing *United States v. Marion*, 404 U.S. 307, 313, 92 S.Ct. 455, 459, 30 L Ed. 2d 468 (1971)). We begin our count, therefore, with defendants' arrest on November 14, 1975. The question then is whether, and for what purposes, we must interrupt it.

The government first contends that we must exclude the periods during the interlocutory appeals when the indictments had been dismissed and not yet reinstated. During the first interlocutory appeal, the indictment was dismissed as to all defendants on May 12, 1976, and a superseding indictment was not returned until June 18, 1980. During the second interlocutory appeal, the superseding indictment was dismissed as to KaMook Banks on August 8, 1980, and was not reinstated as to her until our mandate issued on January 31, 1983.[1] The government contends that these periods must be excluded on the authority of *United States v. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982).

In *MacDonald*, the Supreme Court held that the sixth amendment speedy trial clause did not apply to delay during the period after charges were formally dropped by the government and before renewed charges were brought. It based this holding on the purposes of the sixth amendment, in contrast to those of the due process clause of the fifth amendment:

> The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by the passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to mini-

[1] The *MacDonald* rationale cannot be applied as far as the second appeal concerns the other defendants because the second superseding indictment remained pending as to them during the time spent on their appeal.

> mize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

Id. at 8, 102 S.Ct. at 1502. Because the formal dropping of charges by the government removes the disabilities with which the sixth amendment is concerned, it is no longer appropriate to apply that amendment. *Id.* at 8-9, 102 S.Ct. at 1502. Delay while no charges are pending is similar to delay prior to indictment, and is to be measured by the due process standard application to pre-indictment delay. *Id.* Due process is not violated unless the delay has caused actual prejudice to the conduct of the defense. *United States v. Marion*, 404 U.S. 307, 325-26, 92 S.Ct. 455, 465-66, 30 L.Ed.2d 468 (1971). No such prejudice need be demonstrated as an essential prerequisite of a sixth amendment claim. *Moore v. Arizona*, 414 U.S. 25, 26, 94 S.Ct. 188, 189, 38 L.Ed.2d 183 (1973) (per curiam).

We accept, of course, these controlling principles, but we do not find them applicable here because our case is different from *MacDonald*. When the government voluntarily dismisses pending charges, "a citizen suffers no restraints on his liberty and is [no longer] the subject of public accusation." *MacDonald*, 456 U.S. at 9, 102 S.Ct. at 1502 (quoting *Marion*, 404 U.S. at 321, 92 S.Ct. at 464). The situation is quite the contrary in the present case, where the indictments were dismissed over the government's opposition and the government vigorously and successfully sought to have them reinstated on appeal. While those appeals were pending, the defendants were subject to

precisely the burdens that the sixth amendment was designed to protect against.

It is true that defendants were not incarcerated or subjected to other restrictions on their liberty during the time when the indictments had been dismissed. They were, however, subject to the imposition of such restraints at any time. Their freedom was far more precarious than that of a person merely subject to investigation but not indicted.

Most important, however, is the fact that defendants' interest in minimizing "the disruption of life caused by arrest and the presence of unresolved criminal charges," *id.* at 8, 102 S.Ct. at 1502, continued unabated during the interlocutory appeals. A formal accusation, as by arrest, "may seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obliquy, and create anxiety in him, his family and his friends." *United States v. Marion*, 404 U.S. 320, 92 S.Ct. at 463. The public accusation in this case clearly maintained its force while the government prosecuted the appeals in order to reinstate the charges against the defendants. The appeals unequivocally stated the government's intention to continue the prosecution and asserted its legal grounds for doing so. Because the government's appeals after dismissal of the indictment bore the indicia and imposed the disabilities of continued, formal public accusation, we cannot escape the conclusion that the defendants remained "accused" during the periods when the government was appealing the dismissals of their indictment.[2]

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[2] *United States v. Ciammitti*, 720 F.2d 927 (6th Cir. 1983), on which the government relies, is not contrary to our hold-

The government next contends that, in any event, the period consumed by the government's own interlocutory appeals should be excluded, because otherwise the government's "absolute right" to appeal would be impaired. The government grounds this right in 18 U.S.C. § 3731, which authorizes appeals by the government from district court orders dismissing indictments or granting motions to suppress evidence.

Certainly the government is entitled to protection of its statutory right of appeal. *See United States v. Booth*, 669 F.2d 1231, 1241 (9th Cir. 1981). In our view, however, it accords too little respect to the right of speedy trial secured by the sixth amendment to exclude entirely from consideration the time spent on the government's interlocutory appeals. If such appeals are not even counted in the period of delay, then "speedy" trials could be postponed for years or decades, no matter how onerous the burdens borne by the defendants in the meantime, and the sixth amendment would not even be implicated. We reject such a per se approach to the problem of delay caused by interlocutory appeals.

It is true that two courts of appeals seem to have adopted the government's position. *United States v. Jackson*, 508 F.2d 1001, 1004-05 (7th Cir. 1975); *United States v. Bishton*, 463 F.2d 887, 890 (D.C. Cir. 1972). Those cases did, however, admit of an

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ing. There the government did not appeal the court-ordered dismissal. During the period after dismissal and prior to indictment, no charges were pending against defendants and no appeal was being prosecuted. Defendants were therefore not subject to the imposition of any restraints on their freedom and were not the subject of any public accusation of guilt.

exception when the government's appeal was taken in bad faith, by neglect, or for purposes of delay. *Id.*; *see United States v. Saintil*, 705 F.2d 415, 418-19 (11th Cir. 1983). The periods of delay involved were also much shorter than those present here. Even so, it seems analytically more sound to count the time taken by the government's appeal within the period of delay, and then to assess the justifications for that appeal under the second step of the *Barker v. Wingo* analysis: that dealing with "reasons for the delay." The importance of protecting the government's statutory right of appeal in a given case can be weighed and ultimately placed in the balance against the damage to defendants' sixth amendment interest. This latter, more flexible methodology appears to have been the one selected by the Fifth Circuit in *United States v. Herman*, 576 F.2d 1139, 1146 (5th Cir. 1978), and we prefer it.[3]

We therefore calculate the delay in this case as ninety months, the period from the arrest of defendants until their indictment was last dismissed on May 20, 1983,[4] some three weeks before their trial was scheduled to begin. Ninety months is by any account an extreme delay and by its very immensity must weigh heavily in the ultimate balance. Since

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[3] This court seems to have applied the same approach as the Fifth Circuit, without extended discussion, in *United States v. Cox*, 475 F.2d 837, 841 (9th Cir. 1973); *see United States v. Osuna-Sanchez*, 446 F.2d 566, 567 (9th Cir. 1971), *cert. denied*, 404 U.S. 1022, 92 S.Ct. 698, 30 L.Ed.2d 672 (1972).

[4] We select May 20, 1983, as the ending date because it is the date of the order of the district court that is the subject of this appeal. We must review that order to determine whether it was correct when made.

this ninety-month delay is without question "presumptively prejudicial," we proceed to the remaining three steps of the *Barker v. Wingo* analysis.

B. Reasons for the Delay

Seventy-five months of the delay in this case can be attributed to the two interlocutory appeals. The first appeal taken by the government consumed forty-six months; the second, in which both sides appealed, consumed twenty-nine months. Our task is to examine the reasons for these delays and to determine the degree to which they weigh against or in favor of the government. *Barker v. Wingo*, 407 U.S. at 531, 92 S.Ct. at 2192.

In assessing the delay attending the first appeal, we address the dynamite counts and the nondynamite counts separately. With respect to the nondynamite counts, the delay for the interlocutory appeal was wholly unnecessary, as we pointed out in *United States v. Loud Hawk*, 628 F.2d at 1150. The government appealed to overturn the order of the district court suppressing evidence relating to the dynamite; there was no reason why the government could not have gone forward with prosecution of the nondynamite charges. While a single trial doubtless would have been more convenient for the government, that convenience must be judged a slight reason for incurring the substantial delay of forty-six months. The postponement of trial of the nondynamite charges during the first appeal consequently weighs heavily against the government.

The government's reasons for appealing the suppression order relating to the dynamite charges are substantial, in light of "the necessity of the appealed question to the government's case, the strength of the

government's position on that issue, and the seriousness of the crime." *United States v. Herman*, 576 F.2d at 1146. The suppressed evidence was crucial to the government's case on the dynamite charges. The strength of the government's position was demonstrated by its success in the appeal. The crimes charged were serious. The government's action in taking the appeal was therefore clearly justified, and would of itself support a reasonable delay. The problem is that this appeal took forty-six months.

While some of this appellate delay can be attributed to defendant's unsuccessful petition for certiorari,[5] most of the delay must be attributed to the processes of this court. Even in light of the heavy docket and limited membership of this court at that time, and of the fact that the difficult issues presented were ultimately taken en banc, the appeal took an extraordinarily long period of time. The government, of course, could do nothing about that problem. It is therefore a "neutral" reason for delay, similar to congestion in the trial court. *See Barker v. Wingo*, 407 U.S. at 531, 92 S.Ct. at 2192. Such neutral reasons, however, are to be weighed against the government, although not as heavily as some others, "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* In other words, courts can deprive defendants of the right of speedy trial just as prosecutors can. The forty-six month delay attending the government's appeal of the suppression order consequently weighs against the government.

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[5] Defendants' petitions for rehearing and certiorari consumed only six months. The delay attributable to this factor is insignificant in the context of a total delay of forty-six months.

The second interlocutory appeal took twenty-nine months. Three of the defendants appealed the district court's order denying their motion to dismiss for vindictive prosecution. The government appealed the dismissal of the indictment as to KaMook Banks. Again, the government's appeal was justified and it succeeded in obtaining the relief it sought.

Three of the defendants were themselves appellants in the second interlocutory appeal. Authority provides little guidance for evaluation of delay caused by defendants' appeals, but the same elements appear to be relevant. In applying them, however, care must be taken to guard against defendants' manufacturing delay for purposes of a later speedy trial claim. Appeals taken in bad faith or for purposes of delay must weigh against defendants in the sixth amendment balance, as should appeals taken with little merit or hope of success. The interlocutory appeals taken by defendants here have not been shown to have been taken in bad faith or for delay. They were dismissed ultimately as improper interlocutory appeals, but that result was dictated by the intervening decision of *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982). At the time the appeals were taken, the law of this circuit permitted appeals from an order denying dismissal on grounds of vindictive prosecution. *United States v. Burt*, 619 F.2d 831 (9th Cir. 1980). While defendants were not compelled to appeal prior to trial under the circuit law, they had a right to do so, and that right is entitled to protection. The issue being appealed was certainly important to their defense. Their appeal was justifiable, and we conclude that the delay attending it in this court should therefore not be weighed against defendants.

We also conclude, however, that the time taken for normal handling of the appeal that defendants elect to pursue before trial ought not to weigh against the government either. If the court's own processes unduly delay the appeal, that "neutral" reason must weigh lightly against the government. There was no such undue delay here in the twenty-three months from notice of appeal to decision by this court. To that point, therefore, the reasons for the delay caused by defendants' interlocutory appeal weigh for or against neither side.

The additional delay of six months that occurred as a result of the defendants seeking certiorari from the judgment of this court dismissing the appeal cannot be viewed as neutral. In light of the recent decision of *Hollywood Motor Car Co.* by the Supreme Court, and in light of this court's total reliance on it, the chances of defendants' obtaining review by certiorari were virtually nil. That portion of the delay must be wholly excused.

C. Assertion of Speedy Trial Right

The district court found that the defendants objected to the delay as early as May 12, 1976, when the government announced that it was not ready to proceed to trial. After each remand from this court, defendants moved the district court to dismiss the indictment on the grounds of unnecessary delay and violation of their speedy trial right. Finally, defendants objected to every continuance of their trial date after the last remand. These assertions of defendants are "entitled to strong evidentiary weight" in determining whether their rights to a speedy trial have been denied. *Barker v. Wingo*, 407 U.S. at 531-32, 92 S.Ct. at 2192-93.

D. Prejudice to Defendants

The kind of prejudice that the speedy trial clause is primarily intended to prevent is personal prejudice: "lengthy incarceration prior to trial, . . . the lesser, but nevertheless substantial impairment of liberty imposed on an accused while released on bail, and . . . the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States v. MacDonald*, 456 U.S. at 8, 102 S.Ct. at 1502. The defendants here were incarcerated only for short periods, and were released without restriction during almost all of the period of delay. They have had to live for seven and one-half years with the anxiety of unresolved criminal charges, and the social disruption that accompanies that condition. They have therefore suffered some personal prejudice.

The district court also found that defendants had suffered prejudice to the conduct of their defense because of the inordinate delay. While prejudice to the defense is not the primary concern of the speedy trial clause, it is not irrelevant. *See Barker v. Wingo*, 407 U.S. at 532, 92 S.Ct. at 2193.[6] The district court based its finding of prejudice on the fact that witnesses had died and at least two others no longer

[6] We do not regard *United States v. MacDonald*, 456 U.S. at 8, 102 S.Ct. at 1502, to have overruled *sub silentio* that part of *Barker v. Wingo* that renders prejudice to the conduct of the defense a relevant consideration. *MacDonald* emphasized that the sixth amendment is not "*primarily* intended to prevent prejudice to the defense caused by passage of time." *MacDonald*, 456 U.S. at 8, 102 S.Ct. at 1502 (emphasis added). *MacDonald* neither held nor, we think, intended that prejudice to the defense could never be a factor in sixth amendment speedy trial analysis. *See id.* at 23, 102 S.Ct. at 1509 (Marshall, J., dissenting).

recalled the events in issue. The government contends that there is no showing that these witnesses would have been favorable to the defense, and also argues the defendants made no attempt to depose the witnesses.

The showing of prejudice to the defense is somewhat speculative, partly because of the inherent difficulty of predicting the effect of the death or loss of memory of witnesses on a trial not yet held. *See United States v. MacDonald*, 435 U.S. 850, 858-59, 98 S.Ct. 1547, 1551-52, 56 L.Ed.2d 18 (1978). We therefore place little weight on this factor in the *Barker v. Wingo* balance. We do not, however, discount entirely the impairment of a fair trial that may well result from the absence or loss of memory of witnesses in this case. *See Barker v. Wingo*, 407 U.S. at 532, 92 S.Ct. at 2193; *United States v. Macino*, 486 F.2d 750, 754 (7th Cir. 1973). We also note, once again that prejudice to the defense is not an essential element of a sixth amendment speedy trial claim. *Moore v. Arizona*, 414 U.S. at 26, 94 S.Ct. at 189.

III.

Balancing the four *Barker v. Wingo* factors to determine whether there has been a violation of the sixth amendment is far from an exact science. None of the factors is "either a necessary or sufficient condition to the finding of a deprivation of the right." *Barker v. Wingo*, 407 U.S. at 533, 92 S.Ct. at 2193. After weighing all four factors, however, we conclude that defendants' speedy trial right has been violated.

The most weighty factor by far is the length of delay. We are confronted with a seven and one-half year delay (which incidentally would become closer to nine years if we remanded for trial). The Supreme

Court in *Barker v. Wingo* described the five year delay there as "extraordinary" and found the case to be "close" even though there was a minimal showing of prejudice and the defendant did not want a speedy trial. The far longer delay here is more than enough to tip the balance in the circumstances of this case.

> It is manifest that prejudice, always a difficult thing to ascertain, must, at some point, be presumed to result from an inordinate delay in bringing a defendant to trial. Exactly where that point lies on the spectrum of pretrial delay is uncertain, but it is clear that the longer the delay, the heavier the weight to be given it in the balance.

United States v. Macino, 486 F.2d 750, 752 (7th Cir. 1973); *see United States v. Holt*, 448 F.2d 1108, 1109 (D.C. Cir.), *cert. denied*, 404 U.S. 942, 92 S.Ct. 292, 30 L.Ed.2d 256 (1971).

The other three *Barker v. Wingo* factors also contribute, on balance, to our conclusion that defendants' speedy trial rights have been violated in this case. The reasons for a large part of the delay weigh against the government, even though to a substantial degree it was court delay. The defendants asserted their rights to a speedy trial. Finally, personal prejudice, while minimal in comparison with that resulting from lengthy incarceration, was nevertheless present. Prejudice to the conduct of the defense is also likely, but the balance tips sharply in defendants' favor without it.

The district court was correct in concluding that trial would violate the sixth amendment rights of the defendants. Its order dismissing the indictment with prejudice is AFFIRMED.

WALLACE, Circuit Judge, dissenting:

I dissent. The majority has misconstrued *United States v. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982) (*MacDonald*), which applies in this case to exclude from the sixth amendment measurement of speedy trial the periods between live indictments against the defendants.

I

The majority observes that the speedy trial clause did not apply in *MacDonald* between the government's good faith voluntary dismissal of military charges and a subsequent civil indictment. This does not mean, as the majority holds, that *MacDonald* fails to apply to involuntary dismissals or dismissals from which the government appeals. The Supreme Court, in a general statement of its holding, said: "Any undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized under the Due Process Clause, not the Speedy Trial Clause." *Id.* at 7, 102 S.Ct. at 1501. Nowhere in the remainder of its opinion is there any hint that the Court meant only voluntary dismissals. *See id.* at 7-11, 102 S.Ct. at 1501-1503. On the contrary, in a footnote it commented "[o]ur holding agrees with . . . the Speedy Trial Act of 1974, . . . that if charges are initially dismissed and later reinstated, the period between the dismissal and the reinstatement is not to be included in computing the time within which a trial must commence. 18 U.S.C. §§ 3161(d), 3161(h)(6)." 456 U.S. at 7 n.7, 102 S.Ct. at 1501 n.7. Section 3161(h)(6) applies only to voluntary dismissals by the government. Section 3161(d), however, applies to dismissals on the motion of a defendant, "any charge

contained in a complaint filed against an individual . . . dismissed or otherwise dropped," and dismissals "by a trial court and reinstated following an appeal." For the *MacDonald* holding to agree, as it says it does, with section 3161(d), the theory of its holding must include dismissals other than voluntary dismissals by the government.

Later in the same footnote, the Supreme Court cited with apparent approval a number of Speedy Trial Act cases that excluded the period after dismissal of initial charges in counting time. *See* 456 U.S. at 7-8, n.7, 102 S.Ct. at 1501-1502 n.7. Among them was *United States v. Bishton*, 463 F.2d 887 (D.C. Cir. 1972), where the government charged the defendant in the District of Columbia Court of General Sessions, appealed and lost after dismissal of the charges, and then brought the same charges in federal district court. *See id.* at 889, 891. This citation reinforces the clear meaning of *MacDonald*: delay after a dismissal of charges does not normally count for sixth amendment speedy trial purposes.

Applying the *MacDonald* rule to this case, the period from November 14, 1975 to May 12, 1976 counts for sixth amendment purposes for all defendants. A live indictment stood against them during that six-month period from arrest to dismissal of the indictment with prejudice. The period from March 12, 1980 (for the dynamite matters) and June 18, 1980 (for the nondynamite matters) to May 30, 1983 counts for sixth amendment purposes for all defendants except KaMook Banks. Live indictments stood against those defendants during that roughly three-year period from our reinstatement of the dynamite counts and the superseding indictment's reinstatement of the nondynamite counts until dismissal of the

indictment with prejudice again. The time between 1976 and 1980 when no live indictment stood against the defendants after the first dismissal with prejudice does not count for sixth amendment purposes under the *MacDonald* rule. The time between August 30, 1980 and January 31, 1983, when no live indictments stood against Kamook Banks does not count as to her for sixth amendment purposes under *MacDonald*. Thus, the speedy trial clause time for most of the defendants totaled approximately three and a half years. The speedy trial clause time for Kamook Banks totaled slightly more than one year.

According to *MacDonald*, the sixth amendment guarantee of a speedy trial "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." 456 U.S. at 8. These concerns did not apply to the defendants during the times after dismissals when no live indictments were outstanding against them. They were not incarcerated then. They were not hobbled by bail then. They were not under arrest then. Had the district court imposed bail pending the appeals, *see* 18 U.S.C. § 3731, that restriction might have triggered the running of time for purposes of the speedy trial clause, but the defendants did not have to post bail. These facts indicate that excluding the times after dismissal when no live indictments stood against the defendants in this case comports both with the letter of the *MacDonald* rule and the purposes of the sixth amendment.

The majority argues that because the defendants "were . . . subject to the imposition of such restraints

at any time" during the appeals of the dismissed indictments, the sixth amendment applies to those periods. That contention is inconsistent with *MacDonald* where the Supreme Court distinguished *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1 (1967) (*Klopfer*), on grounds that the prosecutor in that case could activate the charges and restore the case for trial " 'without further order' of the court." *MacDonald*, 456 U.S. at 8-9, n.8, 102 S.Ct. at 1502, n.8, *quoting Klopfer*, 386 U.S. at 214, 87 S.Ct. at 989. Contrary to *Klopfer*, imposition of restraints pending appeal on the defendants in this case would require " 'further order' of the court." They were in essentially no worse position than before their first arrest when the government had discovered probable cause but not yet successfully acted on it.

The Constitution provides "the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. The Supreme Court recently stated in *United States v. Gouveia*, —— U.S. ——, ——, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146 (1984) (citations omitted) (*Gouveia*), that this right "may attach before an indictment and as early as the time of 'arrest and holding to answer a criminal charge.' " But even *Gouveia* does not assist the defendants because the most public investigation, promise to prosecute, or government statement of criminal conduct does not reach the required threshold; the government had not imposed its formal power directly on any alleged wrongdoer. As *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971) (emphasis added) (*Marion*), holds: "it is either a *formal* indictment or information or else the *actual* restraints imposed by arrest and holding to answer a criminal charge that engaged the particular protec-

tions of the speedy trial provision . . . ." *Accord, e.g., United States v. Mills*, 641 F.2d 785, 787 (9th Cir.), *cert. denied*, 454 U.S. 902, 102 S.Ct. 409, 70 L.Ed.2d 221 (1981). The government's public intent to prosecute and its efforts on appeal to obtain the legal authority to do so did not constitute an exercise of *formal* power directly on the alleged wrongdoers. Because the government did not seek bail, no *actual* restraints were imposed. By misreading *MacDonald*, the majority has incorrectly extended the sixth amendment beyond these limits imposed by the Supreme Court.

II

Even after properly excluding part of the delay in this case under the *MacDonald* rule, a clear sixth amendment question remains. Three and a half years, the relevant period for most of the defendants, is a suspect delay. *See Moore v. Arizona*, 414 U.S. 25, 27, 94 S.Ct. 188, 190, 38 L.Ed.2d 183 (1973). One year, the relevant period for Kamook Banks, is less suspect but I will assume for purposes of this appeal that it is also adequate to trigger the balancing test of *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (*Barker*). *See id.* at 530-31 & n.31, 92 S.Ct. at 2191-92 & n.31.

In *Barker*, the Supreme Court identified four major factors for resolving a constitutional speedy trial claim. "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530, 92 S.Ct. at 2192. Since *Barker*, the Supreme Court has reduced the last of these factors—prejudice—to, at best, minimal importance. *See MacDonald*, 456 U.S. at 8, 102 S.Ct. at 1502. As foreshadowed as long ago as *Marion*, *see*

404 U.S. at 324, 92 S.Ct. at 465, "prejudice to the defense caused by passage of time . . . is protected primarily by the Due Process Clause and by statutes of limitations," *MacDonald*, 456 U.S. at 8, 102 S.Ct. at 1502. *See also, e.g., United States v. Lovasco*, 431 U.S. 783, 788-89, 97 S.Ct. 2044, 2047-48, 52 L.Ed.2d 752 (1977); Fed. R. Crim. P. 48(b).

The defendants in this case adequately asserted their rights to a speedy trial. As a result, the length of delay and reasons for delay amount to the most important factors for speedy trial analysis. Of the three and a half year period applicable to most of the defendants, almost two years involved their own appeal from the district court's denial of their motion to dismiss for vindictive prosecution. As the majority must concede, this period should not weigh against the government. The majority must also concede that the six months wasted by the defendants seeking rehearing en banc and certiorari in the face of new, directly controlling Supreme Court precedent, *e.g., United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982), at least cannot weigh against the government. Such essentially frivolous petitions, *see generally, e.g.*, Baker, *A Practical Guide to Certiorari*, 33 Cath. U. L. Rev. 611, 616-21, 622-23 (1984), should weigh against the defendants. But even considering that six month period as neutral, only one year remains that might possibly weigh against the government. Of that period, forty-one days are attributable to a trial date continuance ordered by the district court on its own motion. Given the complexity of this case, the time necessary to prepare all trial matters and the additional time necessary to prepare for trial again after interlocutory appeal, I cannot say that, on balance,

this one year of delay violated the defendants' sixth amendment rights to a speedy trial.

Kamook Banks's case is less close. Of the slightly more than one year relevant to sixth amendment analysis, she wasted a good portion seeking certiorari along with the other defendants. I cannot say the remaining period violated her sixth amendment right to a speedy trial.

III

Because the district court failed to apply the *MacDonald* rule to exclude for sixth amendment purposes the periods between live indictments against the defendants, we should at least remand for reconsideration. The district court abused its discretion, *see United States v. Mills*, 641 F.2d at 787; *United States v. Simmons*, 536 F.2d 827, 832 (9th Cir.), *cert. denied*, 429 U.S. 854, 97 S.Ct. 148, 50 L.Ed.2d 130 (1976), by dismissing the last indictment on speedy trial grounds based on such an erroneous calculation of delay. Because I find the record sufficient to conclude that the remaining delays are largely excusable under the balancing test of *Barker*, I would prefer not to delay the resolution of this case further but to reverse and remand for trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 80-1574, 80-1582, 80-1583 and 80-1630

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DENNIS JAMES BANKS, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RUSS REDNER, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

KENNETH MOSES LOUD HAWK, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

KA-MOOK BANKS, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the District of Oregon

Argued and Submitted Jan. 7, 1981
Decided July 29, 1982
Rehearing and Rehearing En Banc Denied
Oct. 5, 1982

Before KENNEDY, FERGUSON and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge.

Defendants Dennis Banks, Russ Redner and Kenneth Moses Loud Hawk appeal from an order of the district court denying their motion to dismiss their indictment on the ground of vindictive prosecution. The Government cross-appeals from the same order, which dismissed the entire indictment as to defendant Ka-Mook Banks. However, the Government does not contest the district court's dismissal of Count VII of the indictment as to Ka-Mook Banks,[1] *see* Opening Brief of Plaintiff-Appellant 38 n.22;[2] rather, the Government contends only that it was error for the district court to dismiss the entire indictment against Ka-Mook Banks where the court's finding of an undispelled appearance of vindictiveness was based solely on the addition of one new count to a superseding indictment. The events leading to the initiation of this

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[1] Count VII of the indictment is applicable only to Ka-Mook Banks and Count VI is applicable only to Dennis Banks. Counts I through V of the indictment are applicable to all defendants. See *infra* note 4.

[2] The United States' brief states that "the Government is not appealing the district court's ruling on the new gun count." The Government's explanation for its decision is its desire "to avoid further complicating this appeal and in the interest of avoiding further delay in this already protracted litigation . . . ."

prosecution more than five years ago are recounted in detail in the court's previous *en banc* decision. *United States v. Loud Hawk*, 628 F.2d 1139, 1141-44 (9th Cir. 1979) (*en banc*), *cert. denied*, 445 U.S. 917, 100 S.Ct. 1279, 63 L.Ed.2d 602 (1980).

Loud Hawk, Redner, and Ka-Mook Banks were arrested by Oregon state police in November of 1975, after the FBI had notified Oregon authorities of their possible presence in the state. The vehicles in which the appellants were travelling were impounded and subsequently searched pursuant to a state warrant. The search disclosed firearms, ammunition, one electric blasting cap, a large quantity of non-electric blasting caps, and material thought by state police conducting the search to be dynamite. *United States v. Loud Hawk*, 628 F.2d at 1142-46. State authorities subsequently decided that the explosive material should be destroyed, and this was done in the presence of an FBI agent, who photographed the process.

A five count superseding indictment was brought on December 22, 1975, charging all defendants with three counts relating to possession and transportation in commerce of an unregistered destructive device and one count of transporting firearms, and charging Dennis Banks alone with one count of being a felon in possession of firearms. Two days later the defendants filed a motion seeking dismissal of the indictment, or alternatively, suppression of any secondary evidence relating to the alleged destructive device, in light of the destruction of the explosive material which was a significant component thereof. Judge Belloni initially denied this motion, but on reconsideration and after a hearing, he granted the motion to suppress. The Government filed a notice of appeal from this order, and at the same time requested a continuance of the trial date, at that time

less than a month off. The Government argued that a continuance was necessary in order to effectively preserve its right to appeal the suppression order. The motion for a continuance was denied. When the case was called for trial on May 12, 1976, the Government answered not ready; pursuant to Federal Rule of Criminal Procedure 48(b), Judge Belloni dismissed the indictment with prejudice.

The district court's decision was affirmed by a panel of this court. Application for an *en banc* consideration was made and granted, and this court *en banc* remanded to the district court for 45 days for an evidentiary hearing on the nature and extent of the federal government's participation in the destruction of the explosive material. This court retained jurisdiction of the case. Order of Remand, March 6, 1978. The district court held the evidentiary hearing and made findings of fact, as directed in the order of remand. This court, sitting *en banc*, then reviewed the orders of the district court in light of the hearing on remand and reversed both the suppression order and the dismissal of the indictment with prejudice. *United States v. Loud Hawk*, 628 F.2d at 1146-51. In our opinion, we distinguished the counts relating to the destructive device from those involving firearms violations. As to the former, we concluded that it was error to dismiss for "unnecessary delay" under Federal Rule of Criminal Procedure 48(b) where the delay was "necessary to permit the meaningful exercise of [the Government's] statutory right" to appeal under 18 U.S.C. § 3731. *Id.* at 1150. The district court was instructed to reinstate these counts following remand. We stated, however, that this rationale did not encompass the firearms counts. As to those counts, we said that dismissal was proper, but held

that the district court had failed to give the Government the requisite "forewarning . . . that dismissal *with prejudice* will result from a failure to proceed to trial." *Id.* (emphasis added). We thus reversed the dismissal with prejudice and remanded to the district court "for further consideration of its dismissal of these counts in light of this opinion." *Id.* at 1151.

Upon remand, the defendants urged, and the district court subsequently held, that the firearms counts could not simply be reinstated. The Government then decided to obtain a new indictment from the grand jury, which it did on June 18, 1980. The new indictment re-charged Dennis Banks with being a felon in possession of firearms. It also re-charged all of the defendants with the original firearms count (although it substituted "receiving" for "transporting") and two of the original three destructive device counts. However, the new indictment also charged all of the defendants with two new destructive device counts relating to a different type of destructive device.[3] It also charged Ka-Mook Banks with an entirely new count of receiving firearms while under indictment for a felony, (Count VII).

It was this new indictment that prompted the motion to dismiss for vindictive prosecution which we consider here. Judge Redden granted the motion as to appellee Ka-Mook Banks, finding that the Government had failed to dispel the appearance of vindictiveness created by the addition of the new firearms

[3] The destructive device which was the subject of the original indictment and which was recharged in the new indictment was described as containing an "electrical blasting cap," while the destructive device added in the new indictment was described as containing "150 Atlas non-electric blasting caps."

count against her. He denied the motion as to the remaining defendants, finding that the new counts relating to the additional destructive device were "a product of independent judgment of subsequent prosecutors," a circumstance that he concluded dispelled the appearance of vindictiveness.

The Government appeals the dismissal of counts I through V of the indictment as to Ka-Mook Banks. Redner, Loud Hawk and Dennis Banks appeal the denial of their motion to dismiss the indictment as to them. The Government contends that the appearance of vindictiveness was dispelled in Ka-Mook Banks' case because the new indictment was the product of the independent judgment of subsequent prosecutors. The other defendants argue that there was an undispelled appearance of vindictiveness in their cases for the same reason as there was in the case of Ka-Mook Banks, and that the new indictment should be dismissed as to them also.

I

This court does not have jurisdiction under 28 U.S.C. § 1291 to review the district court's interlocutory order refusing to dismiss the indictment on the ground of vindictive prosecution. *United States v. Hollywood Motor Car Co.*, —— U.S. ——, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982) (per curiam). The appeals of Dennis Banks, Russ Redner, and Kenneth Moses Loud Hawk are dismissed.

II

The district court dismissed all six counts in the indictment pertaining to Ka-Mook Banks because it found that the Government's action in adding an additional count (Count VII) against Ka-Mook Banks in

the new indictment gave rise to the undispelled appearance of vindictiveness. The Government does not contest the dismissal of Count VII, but rather only the dismissal of the remaining counts in the indictment. The Government argues that when the appearance of vindictiveness results from the addition of a new count to a superseding indictment, the proper remedy is to dismiss only the added count and to leave the remaining counts intact. The Government therefore asks that we vacate the portion of the district court's order that dismisses Counts I through V as to Ka-Mook Banks and that those counts be ordered reinstated. We have jurisdiction over the Government's appeal pursuant to 18 U.S.C. § 3731, which provides that "[i]n a criminal case an appeal by the United States shall lie to a court of appeals from a[n] . . . order of a district court dismissing an indictment . . . as to any one or more counts . . . ."

The Government raises the question of the appropriate scope of the remedy for vindictive prosecution in a peculiar procedural setting—a setting that makes it unnecessary for us to reach that troublesome and important question. At the time the district court dismissed the indictment as to Ka-Mook Banks, both the district court and the parties assumed that a pretrial action of the prosecutor that increased the risk of punishment after the exercise of a right by the defendant gave rise, *ipso facto*, to an appearance of vindictiveness, and that dismissal of the indictment was required unless the prosecutor rebutted or dispelled that appearance.[4] After the Government had

[4] The court and the parties properly relied on the law of this circuit as it stood at the time. *See, e.g., United States v. Burt*, 619 F.2d 831 (9th Cir. 1980); *United States v. Griffin*, 617 F.2d 1342 (9th Cir.), *cert. denied*, 449 U.S. 863, 101 S.Ct. 167, 66 L.Ed.2d 80 (1980).

appealed, and the case had been argued, the Supreme Court held in *United States v. Goodwin*, —— U.S. ——, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982), that a presumption of vindictiveness was not warranted simply because, prior to an initial trial, the charge against a defendant was increased from a misdemeanor to a felony following the defendant's request for a jury trial.

In rejecting the defendant's argument that a presumption of vindictiveness was warranted whenever the Government had increased the risk of punishment after the defendant had exercised a procedural right, the Court in *Goodwin* emphasized that "[a] prosecutor should remain free *before trial* to exercise the broad discretion entrusted to him to determine the societal interest in prosecution. An initial decision should not freeze future conduct. . . . [T]he initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." *Id.* at ——, 102 S.Ct. at 2493 (emphasis added). The Court distinguished the two cases in which it had applied a presumption of vindictiveness, *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1968) and *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1972), on the ground that both "involved the defendant's exercise of a procedural right that caused a complete retrial." *Id.* —— U.S. at ——, 102 S.Ct. at 2490.

Although the Court in *Goodwin* refused to apply a presumption of vindictiveness to the pretrial actions of the prosecution in that case, the Court recognized

"that a defendant in an appropriate case might objectively prove that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." *Id.* at ——, 102 S.Ct. at 2494. Following the Court's decision in *Goodwin*, we reversed an order dismissing an indictment on the ground of pretrial prosecutorial vindictiveness, *United States v. Gallegos-Curiel*, 681 F.2d 1164 (9th Cir. July 21, 1982), saying "there must be a threshold showing of vindictiveness or the likelihood of it before the court is justified in inquiring into the prosecutor's actual motives." *Id.* at 1169. We held that "an appearance of vindictiveness results only where, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal rights." *Id.* at 1169.

If, as in *Goodwin* and *Gallegos-Curiel*, there is not a reasonable likelihood of vindictiveness when the prosecutor decides to increase charges based on his review of the evidence prior to trial because he has simply come to realize that information possessed by the State has a broader significance," *Goodwin*, —— U.S. at ——, 102 S.Ct. at 2493, there is even less likelihood of vindictiveness when the prosecutor is required by court order to obtain a new indictment. In the latter case the prosecutor will *necessarily* have to review the evidence and reconsider what charges to present to the grand jury.

In this case the prosecutor clearly had a legitimate reason to reconsider the scope and content of the new pretrial indictment. Long after the original indictment was obtained, but before any trial had been held, the Government was compelled by court order to obtain a new indictment and to present witnesses and evidence to a new grand jury. Under these circumstances, we cannot say that there is a "realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or punitive animus toward the defendant . . . ." *Gallegos-Curiel*, at 1169.

We are aware that there have been many hotly contested disagreements between the parties during the lengthy proceedings that have marked the Government's thus far unsuccessful efforts to bring this case to trial. However, our conclusion that the "reasonable likelihood" requirement was not met is buttressed by some of the findings made by the district court at the time of the vindictive prosecution hearing. The district court specifically said "there is no evidence that the Government's action was vindictive *in fact* . . . nor did I find that the Government acted with a malicious or retaliatory motive." Amended Order, August 12, 1980 (emphasis in original). In light of the holdings in *Goodwin* and *Gallegos-Curiel* and the statements of the district court, we conclude, with the benefit of hindsight, that the dismissal of the indictment as to Ka-Mook Banks was erroneous.

As noted above, the Government does not contest the portion of the district court's order dismissing Count VII; rather, the Government asks only that we order Counts I through V reinstated. That portion of the order dismissing Counts I through V as to Ka-Mook Banks is vacated and Counts I through V are hereby ordered reinstated.

Order REVERSED IN PART as to Ka-Mook Banks; appeals of Dennis Banks, Redner, and Loud Hawk are DISMISSED for lack of jurisdiction.

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 76-1906, 76-2127

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, LEONARD PELTIER, DENNIS JAMES BANKS, DARLENE PEARL NICHOLS, who gives her true name as KAMOOK BANKS, and ANNA MAE AQUASH, also known as ANNIE MAY PICTOU and NAGUSET EASK, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the District of Oregon

Aug. 7, 1979

Rehearing Denied Oct. 1, 1979

Certiorari Denied March 3, 1980

See 100 S.Ct. 1279

Before BROWNING, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, KENNEDY, ANDERSON, and HUG, Circuit Judges.*

TRASK, Circuit Judge, files an opinion and the judgment of the court. BROWNING, EUGENE A. WRIGHT, CHOY, WALLACE, J. BLAINE ANDERSON, and KENNEDY, Circuit Judges, concur in the result and in sections I, II, III and VI.

I

On November 13, 1975, Leonard Peltier and companions were thought by the FBI to be traveling across the State of Oregon. Peltier was then a fugitive from the United States authorities and federal officers were attempting to take him into custody. It was thought that he might be traveling with a party of five others and going east. One other who was believed to be in this party of six and thought to be a federal fugitive was Dennis Banks. The events of the siege of Wounded Knee had occurred a short time before,[1] and the government was still in the process of tracking fugitives from that sorry affair.

Desiring to make Oregon State Police aware of this information, the Portland, Oregon FBI office sent a teletype message on that day to all Oregon law enforcement officers which stated that federal fugitives might be traveling through Oregon in a motor home and a station wagon. Both vehicles were described

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* The Honorable Joseph T. Sneed has recused himself from consideration of this matter.

[1] The incident at Wounded Knee, involving a 71 day occupation of the town, had ended May 8, 1973, but there were apparently federal indictments outstanding for some participants, including Peltier and Banks.

and the license number of the motor home was given. The message then stated that if the vehicles were sighted they should not be stopped, but the FBI notified. The next day, on November 14, at about 9:30 p.m., Oregon State Trooper Griffiths sighted the vehicles and verified their description and the license number of the motor home. He proceeded to stop the vehicles. Griffiths had not read the entire bulletin and made the stop under the impression that the bulletin required it. Findings of Fact at 1.[2] He then

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[2] Trooper Griffiths' exact testimony at the remand hearing was as follows:

"MR. TURNER: It's an "all-points bulletin," and it was used by Trooper Griffiths to stop these two vehicles. I might note for the Court that—

"THE COURT: You can read it. The objection is overruled.

"MR. TURNER: Is the offer received, Your Honor?

"THE COURT: Yes, You can read it.

"MR. TURNER: Thank you. Did you—

"THE COURT: That's what you asked him to do, isn't it?

"MR. TURNER: Yes, sir.

"MR. SCHIFFMAN: Just the final portion of it. My objection is if he reads any of it, he read the entire document.

"MR. TURNER: I have no objection to that, Your Honor.

"THE COURT: All right. Well, read the part that the lawyer asked you to read, and on cross-examination if the lawyer wants to read some more, he can do it.

"Q (By Mr. Turner:) Would you read the last line, sir.

"A If vehicle is sighted, do not stop but advise FBI, Portland, immediately for more details."

"Q All right. Mr. Griffiths, did any Federal officer or agent tell you to disregard that portion of the APB?

"A No.

radioed for help and pulled in between the vehicles with his overhead lights flashing. Both vehicles stopped, with the station wagon about 100 yards behind the trooper's car. Trooper Griffiths got out of his car and approached the motor home on the right. He commanded the occupants of the motor home to get out. An Indian male got out, followed by two Indian women and a small child. Griffiths asked if anyone else was inside and they replied "No." At approximately the same moment the motor home accelerated swiftly forward and the man who had gotten out of it fled toward a fence along the highway. As he jumped the fence about 15 yards from the road he fired a shot in the direction of Trooper Griffiths. The trooper returned two shotgun blasts. Both of these shots missed.

As Trooper Griffiths was approaching the motor home, Corporal Kramer, also of the Oregon State Police, who had responded to the call for aid, got out of his patrol car and shined his flashlight into the rear window of the station wagon. Corporal Kramer cautiously approached the left side of the station wagon. When he reached the driver's door he ordered the driver (later identified as defendant Russ James Redner) out of the vehicle and to the

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"Q And could you explain to the Court why you felt it was important to stop these vehicles?

"A The proximity to the state line was a major factor.

"Q Well, how close were you to the state—State of Idaho, I take it?

"A Yes, Several miles.

"Q All right.

"A And it was my decision to stop the vehicles. I felt it had to be done right then.

"Q All right. Thank you very much."

R.T. at 54, Evidentiary Hearing, May 9, 10, 1978.

rear of the station wagon where he was ordered to stand in the headlights of Kramer's patrol car. On request, the driver produced a Washington driver's license. The officer then approached the passenger's side and ordered the occupant to get out and also stand in the front of the headlights of his patrol car. The passenger was identified as defendant Loud Hawk. Griffiths meanwhile had followed the direction of the motor home and found it on the highway about one-half mile away from the initial stop. The motor was running, the lights were on and the door was shut. No occupants were found inside. Both vehicles were then locked, towed away and impounded by the Oregon State Police until a search warrant was obtained.

On Saturday, November 15, 1975, state search warrants were obtained for the search of both vehicles.[3] The Oregon State Police searched both vehicles on Saturday, November 15, 1975, pursuant to their warrants. No federal agent participated in the decision to obtain the state search warrant. Federal agents observed the search of both vehicles but did not participate directly except that federal agent Hancock entered the motor home on one occasion. The findings of the trial court on remand in part relate the subsequent events:

> "Firearms were found in the motor home, which was searched first, and federal agents were told of this fact.[4] Federal agents then suggested that the station wagon be searched for firearms. State officers opened the station wagon and found the dynamite immediately. Federal agents did not participate physically in the search of the station wagon, and no federal warrant had been obtained. Federal agents did observe the state search and photograph the dynamite as it appeared in the station wagon.
>
> "On November 16, the dynamite was transferred from the station wagon to a state police car by state officers. Federal agents did not participate physically but did observe and photograph the dynamite as it appeared in the trunk of the state police car. Federal agents did not advise or direct any action with respect to the removal or transportation of the dynamite. Federal agents made no request that any of the dynamite be preserved for their purposes. Had such a request been made, state police would have complied.
>
> "The decision not to keep the dynamite was made by Trooper Fettig of the state police, pursuant to an unwritten policy defined by his practice of six years before November 1975. Trooper Fettig's practice of destroying explosives was based on the lack of state storage facilities, problems with chain of custody and public safety considerations. Federal agents did not actively participate in Trooper Fettig's decision not to transport the dynamite for safekeeping. Federal agents were present and aware of Trooper Fet-

[3] Federal search warrants were obtained the following day and executed on the 16th after the Oregon State Highway officers had completed their search. R.T. 1, 9.

[4] Among the firearms found were semi-automatic rifles, police shotguns, handguns, more than 2,600 rounds of ammunition, 150 blasting caps, nine empty pineapple training hand grenades, pocket watches with the faces drilled to permit preparation of time bombs plus other bomb-making equipment such as batteries, wire, cable, etc.

tig's intended destruction of the dynamite and neither encouraged nor discouraged such action.

"The decision to destroy, like the decision not to transport the dynamite, and containers was made by Trooper Fettig, pursuant to state police policy and in his discretion. No federal agent participated in this decision. Federal agent Milam, the only federal agent present at the destruction of the dynamite and containers, rode with a state officer in a car following Trooper Fettig's to a gravel pit outside Ontario for the purpose of observing and photographing the destruction. Agent Milam neither encouraged nor discouraged the destruction of the dynamite and containers." Findings of Fact at 3.

II

A five count superseding indictment charged all of the appellees with three counts relating to possession of an unregistered and unnumbered destructive device

> "consisting of a combination of parts designed and intended for use in converting a device into a destructive device; said combination of parts consisting of: (a) six (6) pocket watches, each with a hole drilled in the face with a metal screw inserted into the hole in a position with the moving hands of the watch, with a soldered battery connector and a ground wire attached with expended flash bulbs attached; (b) four (4) batteries with wires attached; and (c) two (2) expended flash bulbs with wires attached; and said device consisting of watches, timing devices, electrical blasting cap leg wires, wires, electrical blasting cap, detonating cord, batteries, and

> seven (7) cases of DuPont 70 percent dynamite, and said destructive device had not been registered to them in the National Firearms Registration & Transfer Record as required by section 5841, Title 26, United States Code, in violation of section 5861(j) and section 5871, Title 26, United States Code." C.T. at 113, 114, 115.

Count I charged the violation as above; Count II again described the same destructive device and charged violation of the provision requiring identification by serial number as required by section 5842 (c) of Title 26, and 27 CFR 179.102 and violation of sections 5861(i) and 5871.

Count III again described the same destructive device but with violation of different registration requirements.

Count IV charged Loud Hawk with wilfully transporting weapons in interstate commerce which had their serial numbers obliterated, to wit: four Valmet semi-automatic rifles; one Colt AR-15 Cal. 223; three Smith & Wesson .357 Magnums and a Swiss-made 7.5 mm handgun, in violation of Title 18, section 922(k), United States Code.

Count V charged only Dennis James Banks, who was a fugitive when the indictment was returned.

Because the dynamite which was being transported was destroyed by Oregon State Police who had apprehended the defendants, the district court dismissed the dynamite counts with prejudice pursuant to Rule 48(b), Fed. R. Crim. P., on grounds of unlawful suppression of evidence. When the government then declined to proceed with the firearms count until it could appeal the ruling on the dynamite counts, the district judge dismissed the indictment with prejudice. The federal government then appealed the Order Dismissing the Indictment. On June 11, 1976,

the appeals of the suppression order and the order dismissing the indictment were consolidated by this court. Nos. 76-1906 and 76-2127, July 26, 1977.

A panel of this court considered the matter after oral argument and by a divided vote affirmed the judgment of the district court. Application for en banc reconsideration was made and this court en banc directed a remand to the district court for the purpose of obtaining an evidentiary hearing and to make findings of fact with respect to the following matters:

> "1. Did any agent of the federal government participate in the destruction of the evidence? The factual findings should include the nature and extent of the federal participation, if any, in:
>
> "(a) The search for, and possession of, the evidence destroyed;
>
> "(b) The decision not to transport the dynamite for safekeeping;
>
> "(c) The decision to destroy, and the actual destruction of, the dynamite and containers;
>
> "(d) Any other actions or inactions relevant to the destruction of the evidence; and
>
> "(e) Any other actions or inactions to preserve samples or secondary evidence.
>
> "2. What prejudice, if any, was suffered by the defendants as a result of the destruction of the evidence?
>
> "In this order, the term 'dynamite' is used to designate the material that was contained in the cartons and that was destroyed.

> "This court retains jurisdiction of this case and requests the district court to hold hearings and make findings pursuant to this limited remand within 45 days of the date of this Order, or as soon thereafter as practicable." Order of Remand, March 6, 1978.

The district court held an evidentiary hearing on May 9 and 10, 1978, and made findings at its conclusion. Wherever possible in this opinion, matters of fact are taken from the facts developed at that remand hearing and noted in the district court's findings.

III

Throughout the consideration of the case there continues to be uncertainty voiced by the district court and by the defendants as to the nature of the substance contained in the boxes which were destroyed. The district court in its Order Suppressing Evidence makes reference to the fact that "State Police Officers discovered what appeared to be seven cases of DuPont Gelex 2-70% dynamite." Following the evidentiary hearing on remand, the court refers to the explosive as "[t]he substance at issue *which I shall call dynamite for the purpose of these findings. . . .*" (Emphasis added).

Officer Fettig, the explosives expert of the Oregon State Police, who was dispatched to investigate the explosive problem, went to the impounded station wagon and, in his words "opened the driver's right rear door and noticed in the inner compartment of the station wagon, with the seats laid down, that in a greenish black visquine bag there was dynamite."[5]

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[5] Officer Fettig described himself as an explosives technician. He had at that time been with the Oregon State

There was no doubt or equivocation in his judgment or his statement of fact stating that "there was dynamite." Each of the seven boxes was marked "High Explosives Dangerous" and on the side had the following markings:

"50 lbs
Gelex 2 1×8
70% Strength
D73MAO 7B"

together with the logo of the DuPont company prominently displayed. Inside were red cylindrical sticks with heavy wrapping paper covering the contents and marked:

"Explosives Dangerous
Gelex 2
70% Strength
E I Dupont De Nemours & Co. (Inc.)."

Police about six years. He had been in the military service for 25 years as an explosive ordnance disposal expert. He had been an explosives disposal man in World War II overseas for three and one-half years. Back in the United States he was assigned to Aberdeen Proving Grounds. He was an instructor in explosives and explosive devices, chemical and biological warfare. From there he was sent on special assignment clearing bomb ranges that were being returned to the owners after use as practice bombing ranges. In 1950, he was reassigned as an advisor to the Secret Service on bomb disposal procedures for the protection of the President and Vice President of the United States. In 1953, he was assigned to the Far East Command as an explosive ordnance technician on Okinawa and more recently he retired from the Army and has been employed by the Oregon State Police. He testified that he had destroyed on the average between 7,500 and 9,000 pounds of dynamite every year since he has been with the Oregon State Police.

and again carrying the number D73MAO 7B, with a last letter as Q or A, or Y.

There was no testimony or other evidence to prove that it was not dynamite. Certainly it could be detonated and would explode because it did. A witness put on the stand by appellees, Ronald McCreary, qualified as an expert on the basis of using dynamite in road building, which was part of his occupation as a civil engineer. He looked at the pictures of the explosion and stated that the substance did not seem to have the explosive characteristics of the dynamite he was familiar with. Yet, he stopped short when asked the direct question whether he knew that it was dynamite or not, and acknowledged that he did not know.[6]

Photographs were taken of the explosives in the station wagon to show the cartons or boxes of Gelex 2 and the identity of the manufacturer with the serial numbers of the individual sticks so that they could be identified. They were in fact identified by employees of DuPont, manufacturer of the dynamite, by witnesses Bishop and Ursic. Bishop was a magazine keeper of explosives manufactured by the DuPont Company in the March 1973 trial period at its Washington plant. He identified a bill of lading, a cardex

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[6] Testimony of defendant witness Ronald McCreary was as follows:

"Q Now, did I understand your testimony that this appeared to be an incomplete detonation of dynamite? Is that a fair statement?

"A No, I said it was an incomplete combustion of some materials. I do not know what they are.

"Q Oh, you don't know whether it's dynamite or not?

"A Oh, no. I wasn't there.

"Q And you can't tell from the photographs?

"A No."

R.T. at 235, Evidentiary Hearing, May 9, 10, 1978.

file showing the manufacture and shipment of dynamite from the Washington plant and a pack report showing where the material was manufactured and sent to the magazine for storage. The witness testified that the documents reflected the manufacture of 46 cases of Gelex 2 dynamite in 1973. Most important, he testified that those records "list the serial numbers or identification numbers that appear on those sticks of dynamite," *i.e.*, the sticks in the 46 cases. No questions were asked on cross-examination.

Anthony Ursic was the assistant manager of that particular plant [at DuPont, Washington] in 1973. That plant, he testified, manufactured explosives, "dynamite essentially." From exhibit 17, he testified that "[t]he envelope contains paper that is used to wrap dynamite. And it's similar to the type we use at our plant." Evidentiary Hearing, R.T. at 177.

> "Q. Looking at the records you have in Government's Exhibit 17, can you tell where the dynamite which is contained in wrappers 1 through 7 was manufactured and when?
> "A. Yeah. Actually, the code date here is—for Gelax (sic) 2 is 974 MAO 7B, which is similar to the code date on here.
> "Q. And what does that—
> "A. So this indicates that 46 cases were made and shipped to a customer in Montana.
> "Q. And when they were shipped, were they full cases of dynamite?
> "A. Yes."

Evidentiary Hearing, R.T. at 180-81.

When the DuPont employees testified, they referred to the cartons, the wrappers, the substance inside the wrappers, all in terms of "Gelex" or dynamite. They

apparently had not been instructed to use a particular name—"dynamite"—as an artificial or symbolic term for an unknown substance. They referred to the substance as "dynamite" or "Gelex" as a name for a particular DuPont dynamite product.

Finally, neither the indictment nor the statute requires that the explosive be "dynamite." It is couched in broader terms and refers to a "destructive device." [7]

It does not require that the parts be put together and ready for ignition or detonation if the parts are also available from which a destructive device may be readily assembled. *United States v. Shafer*, 445 F.2d 579, 583 (7th Cir.), *cert. denied*, 404 U.S. 986, 92 S.Ct. 448, 30 L.Ed.2d 370 (1971). Under the circumstances in which it was being transported, with firearms and bomb components and ammunition, the explosive here belies any contention that the group was on a peaceful agrarian mission, or that the explosive was to be used to dislodge stumps.

IV

The appellees have pointed to nothing in the circumstances we are concerned with that establishes that the federal authorities participated with the state authorities in destroying the dynamite. From the very beginning, when the FBI sent out its all points bulletin, the federal authorities made it plain that they did not want state authorities to interfere. The state trooper did not comply. He disregarded the

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[7] 26 U.S.C. § 5845(f) reads in part as follows:

> "The term 'destructive device' means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket . . . or (F) similar device."

admonition.[8] When the vehicles were secure, they were in state possession and not federal possession. The State of Oregon obtained its own search warrant from a state official and conducted its own search of the vehicles. The state used its own fingerprint expert to examine the vehicles. It called in its own explosives expert, Officer Fettig, to determine what to do with the explosives. That expert made his own decision without calling upon the federal officers. There is no evidence of any connivance or even conference between the two groups of law enforcement officers as to the handling of the problem.

The legal principles we are to look to for a solution to the problem here are well established. When the government loses or destroys tangible evidence prior to trial, a motion to suppress secondary evidence such as photographs, testimony of witnesses, etc., will be granted by the trial court if the defendant can show (1) bad faith or connivance on the part of the government, and (2) that he was prejudiced by the loss or destruction of the evidence. *United States v. Sewar*, 468 F.2d 236 (9th Cir. 1972), *cert. denied*, 410 U.S. 916, 93 S.Ct. 972, 35 L.Ed.2d 278 (1973); *see also United States v. Young*, 535 F.2d 484, 488 (9th Cir.), *cert. denied*, 429 U.S. 999, 97 S.Ct. 525, 50 L.Ed.2d 609 (1976); *United States v. Heiden*, 508 F.2d 898, 902 (9th Cir. 1974); *United States v. Henry*, 487 F.2d 912 (9th Cir. 1973).

Thus, returning to the specific questions asked on the remand and commenting on them seriatim, the first question addressed by this court to the trial court on remand was whether any agent of the federal government participated in the destruction of the evi-

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[8] See Note 2, *supra*.

dence and the nature and extent of that federal participation. There was no finding on remand that there was any federal participation in that destruction.

(a) It was the state trooper who found the defendants in their two vehicles, stopped them on his own responsibility and took charge of the evidence on behalf of the state. At this point the only shred of argument to the contrary is that the stop and impounding of the vehicles was triggered by the teletype message put out by the FBI. But that message directed the state police not to take the persons or vehicles into custody. State Police Officer Griffiths said simply but unequivocally that he made the stop because he thought that was the thing to do despite the bulletin's direction to the contrary. He was acting as an Oregon police officer and not as an adjunct of the federal government, but contrary to its admonition.

(b) The decision not to transport the dynamite for safekeeping was made by Officer Fettig of the Oregon State Police. He testified that it was his responsibility what to do with the explosives and that he was guided solely by his own judgment based on a six-year state policy.

(c) The decision to destroy the explosives was again that of Officer Fettig. It was in accordance with the state policy of long standing and not a decision of the moment after consulting the federal authorities. There was no evidence to the contrary. No evidence or finding indicated there was even any discussion with federal authorities at the scene or elsewhere concerning the manner of disposition of the explosives. Fettig (with assistance of Griffiths, an Oregon State Trooper) transferred the explosives to Fettig's

automobile and organized the three-car convoy that took the dynamite away with one state car leading, the second with Fettig and the explosive and the last car affording protection from the rear.

(d) There was no evidence or finding as to the question of taking samples or preserving other secondary evidence. Both a state police officer and a federal officer took photographs which were made available to the court. Testimonial evidence was available from the officers who witnessed the destruction and the officers testified and were cross-examined and the photographs and dynamite wrappers were introduced.

(e) With respect to the last question addressed to the district court, it concerned "any other actions or inactions" in regard to the destruction of the dynamite. The district court here calls attention to the cross-examination of John O'Rourke, Special Agent in Charge of Oregon, who came to Ontario before the dynamite was destroyed. The testimony of several FBI agents makes it clear that their interest was in locating federal fugitives and particularly Leonard Peltier. O'Rourke was asked if he knew whether Beverly Axelrod, an attorney for the defendants, was in Ontario. He said that he did, and then the inquiry was whether he made any effort to inform her of the impending destruction of the dynamite. He replied that he had not. Likewise, Axelrod never inquired of O'Rourke to be allowed to witness the destruction.

The situation thus remains highly problematical. It is also unclear whether Axelrod was at this time and on this trip actually working for Loud Hawk. She was not produced, nor did she

testify at any of the hearings. Throughout the entire proceedings, Loud Hawk was represented by Schiffman and Jones, a law firm of Portland, Oregon. At the trial, which took place in 1976, the court inquired of Loud Hawk as it did of the others, who their attorneys were, and Loud Hawk then stated he was represented by Lawyer Jones and was satisfied with his services. Axelrod does not appear of record as an attorney at any place in the record we have been able to find. Finally, the point that is attempted to be made, that federal agents failed to have defendants' attorneys examine the dynamite before its destruction, is even less convincing when we remember that O'Rourke was never shown to have had any authority to stop or postpone the destruction of the evidence in the first place. Neither would he have any reason to look for Axelrod and invite her to witness the state's destruction of the dynamite.

The appellees rely on *Lustig v. United States*, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949), to prove that there was federal participation in the search and in the subsequent destruction. Lustig was a principal in a counterfeiting operation which appeared to be in operation in a hotel room. Greene, a Secret Service agent, was suspicious of the activity but apparently did not believe he had enough evidence for a break-in or even to obtain a warrant. He gave the information to the city police who proceeded to obtain an arrest warrant but no search warrant. The city officers entered the room illegally while Greene remained at the police headquarters awaiting their telephone call. As soon as a search warrant was obtained the police officers called Greene who then joined them in making the search. He helped the city

police in the search, selecting evidence that would help a federal prosecution and accepting other evidence the local officers gave him. The Court said:

> "The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter.
>
> . . .
>
> "Though state officers preceded Greene in illegally rummaging through the bags and bureau drawers in Room 402, they concerned themselves especially with turning up evidence of violations of the federal counterfeiting laws after Greene joined them. He was an expert in counterfeiting matters and had a vital share in sifting the evidence as the search proceeded. He exercised an expert's discretion in selecting or rejecting evidence that bore on counterfeiting. The fact that state officers preceded him in breach of the rights of privacy does not negative the legal significance of this collaboration in the illegal enterprise before it had run its course. Greene himself acknowledged such participation by his remark about 'leaving the room after we had gathered all this evidence together.'" *Lustig v. United States*, 338 U.S. 74, 78-79, 69 S.Ct. 1372, 1374, 93 L.Ed. 1819.

In the case before us there was certainly not participation in the *Lustig* manner. The federal officers here did not have a part in the search of the car or in the destruction of the dynamite. Their major concern was with the whereabouts of Leonard Peltier and they hoped to find him among the travelers.

The opinions of this court in *United States v. Higginbotham*, 539 F.2d 17 (9th Cir. 1976), and *United States v. Trenary*, 473 F.2d 680 (9th Cir. 1973), are also of no assistance to appellees. In *Higginbotham*, the appellant was convicted on a Dyer Act charge. Shortly after appellant's arrest, an officer of the Boise, Idaho, Police Department put together a photographic display composed of 18 photographs, one of which was that of appellant. During pretrial proceedings, appellant's photograph was readily identified from among the pictures constituting the display. At trial the display could not be produced because it had been broken up and the pictures returned by local police to their files. Before this court, appellant complained that the failure to produce the display denied him due process. The contention was rejected, Judge Kilkenny stating:

> "Here is a proper place to emphasize that the fifteen photographs were never in the possession of the prosecutor, the FBI or any other United States Government agency. The Boise police, under these facts, cannot be said to be acting on behalf of the federal government but rather on behalf of the State of Idaho. *Cf. United States v. Smith*, 433 F.2d 1266 (CA5 1970). Under such circumstances we should be reluctant to impute to the federal government the mistakes, particularly relatively innocent ones, committed by local police. Moreover, the demand to produce these photographs might well be likened to an attempt to require production under the Jencks Act of statements in the possession of state police. *See Beavers v. United States*, 351 F.2d 507 (CA9 1965), where the statements were never in possession of the United States and production

was not required. By analogy, it is evident that the United States is in no way responsible for the actions of the Boise police in disposing of the fifteen photographs by inadvertence or otherwise." *Id.* at 21.

In *Trenary* there was a conviction for conspiracy to import marijuana from Mexico. The marijuana and duffle bags containing it had been destroyed by the Mexican police before trial. There being no charge of bad faith or negligence by the United States, secondary evidence was admissible at the trial. *Trenary* is another example of the refusal of this court to impute to the federal government the loss or destruction of evidence by other authorities over whom it has no authority or control.

V

The final questions addressed to the trial court concerned prejudice. Under the law of the circuit, even if there should be a finding of participation in the destruction, there must also be a showing by the defendants that they have been prejudiced by the loss of the evidence. *United States v. Sewar*, 468 F.2d 236 (9th Cir. 1972) and cases *supra*. Prejudice was suffered by the defendants, the trial court says, "to the extent that their inability to observe the destruction and to analyze samples of it deprived them of the opportunity to contest the government's conclusion that the substance destroyed was indeed explosive." We have already noted the weakness of the testimony of witness McCreary, who examined the photographs of the explosion and who then declined to express any opinion as to the question whether the explosion was of dynamite or not.

The last finding of the trial court was that the defendants "were also prejudiced by the destruction of the cartons and plastic bag which contained the dynamite in that they were deprived of the opportunity to determine by fingerprinting who might have handled those items."

We find the fingerprinting argument a little difficult to follow. Let us assume that X, Y and Z are being prosecuted for possession of contraband and that the fingerprints of X are found on the contraband. This evidence might be used against X, but it does not affect Y and Z, whose prints were not found. As to defendants here, lack of their fingerprints is exculpatory, if anything. Absence of fingerprints has little significance to prove or disprove handling. The handlers might have worn gloves; they might have removed their prints; or they might have employed someone else to lift the dynamite. It is only where there *are* fingerprints that such identification is helpful, and then helpful to the prosecutor, if to anyone, in establishing an identity not otherwise discovered. Here, there is no prejudice to the defendants in the destruction of the boxes and the plastic covering or any other part of the explosives as a result of possible destruction of fingerprints.

VI

In its second assignment of error, the government contends that the district court incorrectly dismissed the indictment against appellees. The district court's order dismissing the indictment was founded on Rule 48(b) of the Federal Rules of Criminal Procedure. That rule authorizes the court to dismiss an indictment whenever there has been "unnecessary delay in bringing a defendant to trial." The government ar-

gues that the delay in prosecuting appellees has not been "unnecessary," and consequently that the district court abused its discretion in dismissing the indictment. Assuming *arguendo* that the district court did not err in dismissing the indictment, the government contends that the court below did err in dismissing the indictment with prejudice. While dismissal with prejudice is authorized by Rule 48(b), the government points out that such power is to be utilized with caution and only after a forewarning to the prosecution that dismissal with prejudice will result from a failure to proceed to trial. *United States v. Simmons*, 536 F.2d 827, 834 (9th Cir. 1976), *cert. denied* 429 U.S. 854, 97 S.Ct. 148, 50 L.Ed.2d 130, *see also United States v. Charnay*, 577 F.2d 81, 84 (9th Cir. 1978). The government argues that the trial court failed both to exercise the requisite caution and to provide the required forewarning, and thus improperly dismissed the indictment with prejudice.

In examining the government's second assignment of error, the merits of its arguments are best demonstrated if the dynamite and nondynamite counts are analyzed separately.

The dynamite counts. The delay in prosecuting appellees on the dynamite counts has not been unnecessary under Rule 48(b). The government had a statutory right to appeal the suppression order as it applied to the dynamite counts. The delay has been necessary to permit the meaningful exercise of that statutory right.

The government has been granted the right by statute to appeal suppression orders entered by the district court. That right is set forth in 18 U.S.C. § 3731. Section 3731 provides in pertinent part:

> "An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing . . . evidence . . . not made after the defendant has been put in jeopardy . . . if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding."

The government's right to appeal is available conditionally. First, the appeal is not available if the defendant has been put in jeopardy. Second, the appeal must not be taken for purpose of delay. Third, the evidence suppressed must be substantial proof of a fact material in the proceeding. Clearly, these conditions were met in the context of the dynamite counts. (1) Appellees have yet to be placed in jeopardy. (2) The appeal was not taken for purpose of delay. The delay in bringing appellees to trial was necessary to permit the government to effectively exercise its statutory right to appeal. (3) The suppressed evidence was critical in establishing a necessary element of the alleged offenses, the existence of an explosive device.

In summary, the government had a statutory right to appeal the suppression order if certain conditions were met. Those conditions were satisfied as to the dynamite counts. Delay was necessary to permit the government to effectively take its appeal. Clearly, such a delay, necessary to give effect to a statutory right, cannot be deemed "unnecessary" for purposes of Rule 48(b). Therefore, we hold that the district court erred in dismissing the dynamite counts pursuant to Rule 48(b); we reverse that portion of the

district court's order dismissing these counts; and remand the cause to the district court with instructions to reinstate the indictment as to these counts.

The nondynamite firearms counts. The delay in prosecuting appellees on the nondynamite counts of the indictment has been unnecessary for Rule 48(b) purposes. As previously discussed, the government's right (via section 3731) to appeal a district court's order suppressing evidence is conditional. One of the conditions is that the evidence suppressed must be substantial proof of a fact material in the proceeding. This condition must be met before appeal of the suppression order can properly be taken. Despite the government's protests to the contrary, the suppressed evidence (dynamite) is not substantial proof of any material fact in the nondynamite counts of the indictment. The trial court found as much. Given the government's failure to satisfy this condition, its appeal of the suppression order as it relates to the nondynamite counts was improper and the delay in prosecution occasioned by this appeal has been unnecessary under Rule 48(b). Therefore, we find that the court below properly dismissed these counts of the indictment.

Having determined that the trial court properly dismissed the nondynamite counts of the indictment, we turn now to the propriety of dismissing those counts with prejudice. In *United States v. Simmons, supra,* at 834, this circuit held that even though dismissal with prejudice is authorized by Rule 48(b), trial courts should utilize such power with caution and only after a forewarning to the prosecution that dismissal with prejudice will result from a failure to proceed to trial. The government argues that the requisite caution and forewarning required by *Simmons* were absent in the trial court's dismissal of the nondynamite counts with prejudice. We agree.

We find the record devoid of any forewarning to the prosecution that the nondynamite counts of the indictment would be dismissed with prejudice. The district court's entry dismissing these counts contains no reference to a forewarning of impending dismissal with prejudice. The remainder of the record is equally as barren.

Any attempts to create the requisite forewarning from a declaration made by the United States attorney at a hearing conducted several days prior to dismissal must also fail. At the hearing the government counsel observed: "[W]e will suffer a dismissal at this time if the Court should choose to do so rather than go to trial on the imperfect case that we would have to present if we were forced to trial now." 12 R.T. at 6. This statement cannot be a sufficient forewarning to satisfy the requirement of *Simmons.* First, the statement was made by the government, not the trial court. It is the trial court that is required to forewarn the prosecutor, not vice versa. Second, and far more important, the government's statement indicates that it was prepared to suffer dismissal. Nothing is said concerning its preparedness to suffer dismissal with prejudice. As indicated in *Simmons,* at 837, it is not enough to forewarn that dismissal may result from a failure to proceed to trial. Rather, the prosecution must be forewarned that the dismissal will be with prejudice.

Given the failure of the trial court to provide the forewarning mandated by *Simmons,* we reverse that portion of the trial court's order dismissing the nondynamite counts with prejudice and remand the cause to the district court for further consideration of its dismissal of these counts in light of this opinion.

In conclusion, we reverse the orders of the district court granting appellees' motions to suppress and to dismiss the indictment with prejudice. Further, we remand the cause to the district court with instructions: (1) to deny appellees' motion to suppress, (2) to reinstate the indictment as to the dynamite counts, and (3) to reconsider its dismissal of the nondynamite counts with prejudice in light of this opinion.

SO ORDERED.

KENNEDY, Circuit Judge, files a separate concurring opinion in which BROWNING, EUGENE A. WRIGHT, CHOY, WALLACE, and J. BLAINE ANDERSON, Circuit Judges, concur.

KENNEDY, Circuit Judge, concurring:

This case presents the opportunity to state certain controlling rules where evidence has been lost or destroyed in a criminal case. Some of our earlier cases, where the proper outcome was perhaps clearer than in the present instance, did not provide extensive analysis of the interests at stake or of the reasons behind the adoption of a particular approach. Loss or destruction of evidence probative in a criminal case occurs in circumstances so variant that we cannot set forth here the applicable rules for every case but certain principles of broad application may be stated with assurance and serve to resolve this appeal.

When criminal evidence is lost or destroyed, the court must protect a complex of interests, some conflicting. Our principal concern is to provide the accused an opportunity to produce and examine all relevant evidence, to insure a fair trial. Absent special circumstances, we do not reverse convictions or dismiss criminal charges based on events that do not cause harm to the accused; and so the degree of prej-

udice from loss or destruction of the evidence should be weighed. Other considerations which bear upon the right to a fair trial are also present if intentional or culpable government action has caused the loss or destruction. The significant interest in such cases is to avoid the impairment of judicial integrity that would occur if the prosecution were allowed to manipulate court processes, and protective rulings or sanctions may be required both to insure a fair trial in a specific case and to deter future violations. The degree of government fault is relevant, for if suppression of secondary evidence or other protective rulings and sanctions were automatic in every case in which the Government is responsible for the loss of the evidence, then we would not give proper recognition to the responsibility of the Government to prosecute criminal cases. This right should not be forfeited in every instance where a government official has erred. In a rare case, government action may be so culpable that deterrence of future violations and protection of judicial integrity become the principal concern, and then only a plausible suggestion of prejudice or none at all would be required for suppression of evidence or the imposition of other sanctions, such as dismissal of the charges. In the more frequent case, the Government's responsibility for loss of the evidence is caused by actions that are, alternatively, negligent in some degree, or inadvertent, or done intentionally but with an element of good faith, and in these instances a somewhat greater degree of prejudice may be tolerated. In cases of severe prejudice, suppression or other sanctions would be appropriate without regard to the good faith or culpability of the Government. However, in other cases, proper reconciliation of these competing interests requires us to

resort to the familiar judicial process of balancing the factors in a given case.

The proper balance is that between the quality of the Government's conduct and the degree of prejudice to the accused. The Government bears the burden of justifying its conduct and the defendant bears the burden of demonstrating prejudice. *See United States v. Mays*, 549 F.2d 670, 677, 678 (9th Cir. 1977). In weighing the conduct of the Government, the court should inquire whether the evidence was lost or destroyed while in its custody, whether the Government acted in disregard for the interests of the accused, whether it was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification. Federal courts have greater authority and control over the actions of federal officers than over the officers of a state, and the nature and degree of federal participation is relevant although not dispositive. It is relevant also to inquire whether the government attorneys prosecuting the case have participated in the events leading to loss or destruction of the evidence, for prosecutorial action may bear upon existence of a motive to harm the accused.

Against all this must be weighed the degree of prejudice to the defendant. In analyzing prejudice, the court must consider a wide number of factors including, without limitation, the centrality of the evidence to the case and its importance in establishing the elements of the crime or the motive or intent of the defendant; the probative value and reliability of the secondary or substitute evidence; the nature and probable weight of factual inferences or other demonstrations and kinds of proof allegedly lost to

the accused; the probable effect on the jury from absence of the evidence, including dangers of unfounded speculation and bias that might result to the defendant if adequate presentation of the case requires explanation about the missing evidence.

We adopted a flexible approach, consistent with the balancing test proposed here, in *United States v. Higginbotham*, 539 F.2d 17 (9th Cir. 1976) (alternate holding).[1] In that opinion the court stated that in destruction of evidence cases, "the following factors should be considered: (1) the degree of negligence or bad faith involved, (2) the importance of the lost evidence, and (3) the sufficiency of the other evidence adduced at the trial to sustain the conviction."[2] *Id.* at 21. The proposed test is also quite

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[1] The balance test of *Higginbotham* is helpful, but the same cannot be said for the discussion in that case of federal participation. We cannot accept the implication that the destruction of evidence by state officers acting alone, no matter how egregious their conduct or how important the evidence destroyed, could never be sufficient for a federal court to invoke a protective rule to guard the rights of the defendant or the integrity of the judicial process. In *Higginbotham* itself, the particular evidence was of minimal importance and the conduct of the state police was at worst careless.

[2] It appears that a type of balancing was used in this circuit, even before *Higginbotham*. In *United States v. Sewar*, 468 F.2d 236 (9th Cir. 1972), *cert. denied*, 410 U.S. 916, 93 S.Ct. 972, 35 L.Ed.2d 278 (1973), the defendant had been subjected to a blood alcohol test. After the test was performed the sample was destroyed by a technician who thought the sample was no longer necessary. The court stated that "[n]ot every blunder by investigators should result in the exclusion of relevant competent, important evidence," 468 F.2d at 237, and concluding that in the circumstances, using the remaining secondary evidence would not be "so unfair as to require its exclusion," *id.* at 238.

similar to the test which the First Circuit has adopted. In *United States v. Picariello*, 568 F.2d 222 (1st Cir. 1978) the court articulated what it called a three-pronged examination which considered "first, was the evidence material to the question of guilt or the degree of punishment; second, was defendant prejudiced by its destruction; and third, was the government acting in good faith when it destroyed the evidence." *Id.* at 227. The appropriate test as set forth here is more detailed than in *Higginbotham* or *Picariello* with the purpose to provide more guidance when this question arises in later cases.[3]

In an analogous area, that of prearrest delay, this circuit has adopted a balancing test similar to the one proposed here. *United States v. Mays*, 549 F.2d 670, 677 (9th Cir. 1977). Where the police delay in arresting a defendant or in otherwise notifying him that he is under investigation, he may later contend he had no notice to preserve evidence such as records, and that testimony of witnesses or his own recollection of the day in question may be blurred by the passage of time. These cases present concerns which closely parallel those in destruction of evidence cases, including fairness to the defendant, the discouraging of police or prosecutorial misconduct, preserving the

[3] We think this test is consistent with the result in *United States v. Heiden*, 508 F.2d 898 (9th Cir. 1974). *Heiden* states that where evidence has been lost or destroyed the conviction will be reversed if the defendant can show "(1) bad faith or connivance on the part of the Government, or (2) that he was prejudiced by the loss of the evidence." As the discussion in *Heiden* demonstrates, "prejudice" as used there means serious impairment of the accused's ability to present his defense. In cases of severe prejudice the *Heiden* formulation would lead to the same result as under the test set forth in this case.

integrity of the judicial system, and protecting society's interest in the prosecution of criminal violations. In *United States v. Mays, supra*, this court rejected the two absolute approaches suggested by the parties: that prejudice alone is sufficient or that both prejudice and improper intentional delay must be shown. It adopted instead a test which balances all the circumstances, including the prejudice to the defendant and the reason for the police delay. Such a balancing test seems equally appropriate for the case at hand.[4]

The test proposed here is not of constitutional dimensions. The Supreme Court in *United States v. Augenblick*, 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969) has stated that destruction of evidence becomes a problem of constitutional dimensions only in the most extreme case:

> The Court of Claims, in a conscientious effort to undo an injustice, elevated to a constitutional

[4] A similar problem to the one faced here arises when the Government intentionally deports potential witnesses before the defendant has had an opportunity to interview them. *See United States v. Mendez-Rodriquez*, 450 F.2d 1 (9th Cir. 1971). This circuit has held that despite good faith on the part of the Government, the defendant need not show that the testimony of the lost witnesses would have been favorable, although he must demonstrate at least some possibility that the testimony could have been of benefit. *See United States v. Orozco-Rico*, 589 F.2d 433 (9th Cir. 1978); *United States v. McQuillan*, 507 F.2d 30, 33 (9th Cir. 1974). In these cases, even a small possibility of prejudice is sufficient despite good faith government conduct. We do not believe, however, that a similar approach is required in destruction of evidence cases. Deportation of witnesses involves the fundamental and specifically guaranteed right of compulsory process for obtaining witnesses provided by the sixth amendment. The sixth amendment is in no way implicated in the case at hand.

> level what it deemed to be an infraction of the Jencks Act and made a denial of discovery which "seriously impeded his right to a fair trial" a violation "of the Due Process Clause of the Constitution." . . . But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal . . . than a disciplined contest.

Id. at 356, 89 S.Ct. at 534. Rarely will the unfairness that might be caused by the destruction of evidence rise to the level of making the proceedings "a spectacle or trial by ordeal." The rule advanced here is simply a judicially-created rule designed to prevent police misconduct and permit as fair a trial as possible.

Turning to the facts of this case, we examine first the reasonableness of the Government's conduct. The starting point is the findings of the district court. In its initial decision, the court found as follows: The police did not act in bad faith in destroying the evidence. Dynamite is a dangerous substance that should only be handled and stored by experts. The Oregon State Police did not have adequate facilities in which to store this dynamite. There was a commercial magazine located about 60 miles away, however, and the dynamite could have been transported there with relative safety. In its supplemental findings on remand, the district court found that the decision not to keep the dynamite was made by officer Fettig of the state police pursuant to an unwritten policy. The practice of destroying explosives was based on the lack of state storage facilities, problems

with chain of custody, and public safety considerations. The record indicates that Fettig's principal responsibility for the state police was as a bomb and explosives expert, for which he was highly qualified. He effected frequent and routine destruction of explosives, although it appears that in almost all such cases the explosives were not relevant to any pending criminal investigation. It is unclear the extent to which the supplemental finding that the decision not to transport was based on "public safety considerations" negates the prior finding that the dynamite could have been transported with "relative safety;" but, there were at least some safety considerations which militated against transporting the dynamite. It should be noted that in addition to destroying the dynamite itself, the police also destroyed the containers in which the dynamite was stored when found. This was apparently done because, as the defendants' expert witness explained, when dynamite is improperly stored, nitroglycerin from the dynamite sticks sometimes seeps into the container, making the container itself highly explosive. Moreover, officer Fettig testified that the reason fingerprints were not taken was that the cartons were wet, and it was unlikely identifiable fingerprints could have been detected.

It is clear that accepted standards of police conduct require that a sample should be obtained whenever it is possible and safe to do so, and we think the enforcement officials, state and federal, erred in not considering the possibility of taking a sample before destroying all the evidence. However, in view of the exigencies of the situation and the police policy of destroying all explosives, this error in judgment ought not be weighed too heavily against the Government.

In this case, the error is neither intensified nor diminished by the actions of federal agents. The dynamite was discovered during a search of the vehicles pursuant to a state search warrant while the vehicles were in the custody of the state police. The district court found that the decision to destroy the evidence was made by officer Fettig, pursuant to state police policy and in his discretion. No federal agent participated in this decision. The one federal agent who was present at the destruction of the dynamite and containers neither encouraged nor discouraged the destruction. The court also found, however, that if the federal agent had requested that a sample be preserved, the state police would have complied. The federal agent was not responsible for the decision, but neither can he be given full exoneration from it. The practical necessity for a federal officer to maintain a good relationship with state police does tend to excuse the federal agent's determination in this delicate situation to allow the state to proceed to render the area safe without requesting an evidentiary sample. It is our conclusion that the actions of both the state police in destroying all the evidence and the federal agent in not preventing that destruction can be excused substantially, although it cannot be recommended as the standard for future cases.

We next consider the prejudice to the defendant. The most important part of our analysis of the degree of prejudice in this case is an evaluation of the reliability or trustworthiness of the remaining secondary evidence. The evidence includes, among other things, photographs and eyewitness descriptions of the boxes which were found in the impounded vehicle and the red cylindrical sticks contained in the

boxes. Each of the seven boxes was marked "High Explosives Dangerous" and on the side had the following markings:

"50 lbs
Gelex 2 1 × 8
70% Strength
D73MAO 7B"

together with the logo of the DuPont company prominently displayed. Inside were red cylindrical sticks with heavy wrapping paper covering the contents and marked:

"Explosives Dangerous
Gelex 2
70% Strength
E I DuPont De Nemours & Co. (Inc.)."

and again carrying the number D73MAO 7B, with a last letter as Q or A, or Y. A representative from The DuPont Co. was shown seven wrappers that had been saved by the police before destroying the dynamite. He identified the wrappers as having come from a DuPont plant in Washington. By consulting other records, he was able to determine that the code numbers on the wrappers were the same as the numbers on dynamite shipped to a customer in Montana. He confirmed that the shipment to Montana was of full cases of dynamite, not just wrappers. In addition, a chemical analysis of the wrappers indicated the presence of six of the seven ingredients necessary to make dynamite.

We consider this secondary evidence to be probative and reliable. The evidence also includes photographs taken by the police when several of the sticks were detonated with blasting caps. The defendants did produce an expert who on direct examination testified that in his opinion the photo-

graphs did not show dynamite exploding and that the pictures were completely consistent with an explosion of only the blasting caps themselves. The district court found that this testimony "cast substantial doubt on the assertion that the photographs showed the detonation of dynamite." Worded this way, the finding seems to suggest that the testimony of the expert raised substantial doubt as to whether the substance seized was dynamite. To the extent that the finding implies this, it must be deemed erroneous. On cross-examination the expert explained that the photographs could also show an incomplete detonation of dynamite. The testimony of this expert simply demonstrates that the photographs of the detonation are not completely reliable. A determination that the photographs are inconclusive evidence is far different from a determination that there is substantial doubt whether the substance seized was dynamite. The testimony of the expert supports only the former proposition, not the latter. In ascertaining the degree of prejudice, it is necessary to evaluate all the secondary evidence, not just one piece of it.

The trial court found further prejudice to the defendants because they lost an opportunity to show whose fingerprints were on the boxes. This too was error. There is no question that the boxes were in the defendant's station wagon. And even if the prints of third persons, and not the defendants', were discovered on the boxes such evidence would not be exculpatory of necessity. Moreover, the testimony was that fingerprints were not likely to be discovered on the wet boxes in any event.

All must concede that the secondary evidence is less reliable than chemical tests of the substance itself and that, as the explosive quality or no of the substance is an essential element of the offense, the loss

of the evidence does bear upon an issue that lies at the core of the case. In view, however, of the convincing and probative value of the secondary evidence as presented in the record at this point, it cannot be said that the defendants have met their burden of showing prejudice in any significant degree. The defendants have not made any offer of proof from which the trier of fact might infer the substance was other than dynamite, and in this posture of the case the secondary evidence is a satisfactory substitute for a physical sample. If at trial the defendants can make a plausible argument that the substance was something other than from what all appearances it must have been, the trier of fact can weigh the credibility of such arguments against any perceived defects in the Government's proof by secondary means. The prejudice in this case is slight or nonexistent, and the Government's conduct, while consisting in part of some errors in judgment, was on the whole reasonable and taken in good faith.

The dissent complains that, having remanded the case, we now accord no deference to the district court's findings. All of the subsidiary findings in the record developed with care by the district judge have put the case in the proper perspective. Perhaps the remand should have stopped short of asking the trial court to draw the ultimate conclusion as to whether or not there is prejudice, absent a statement of its definition and the factors that are to be considered in making that determination. Having now stated at some length the applicable rules for this case, we reach the conclusion that secondary evidence offered by the Government should not be suppressed.

The appropriate order now is to reverse the trial court's ruling suppressing the secondary evidence and to remand the case for further proceedings.

GOODWIN, Circuit Judge, specially concurring.

I concur generally in Judge Trask's opinion. The district court judgment must be reversed on both points. The dismissal with prejudice was unwarranted, and the "finding" that a federal officer participated in a significant degree in the destruction of the contents of the boxes taken from the station wagon is clearly erroneous. The evidence was that the agent of the Federal Bureau of Investigation was an observer and nothing more. Accordingly, the discussion of the consequences of federal participation is obiter.

HUFSTEDLER, Circuit Judge, dissenting, with whom ELY and HUG, Circuit Judges, concur:

I regret that I cannot concur with the majority of my brothers either in reversing the district court's suppression order or in reversing the dismissal of the indictment upon the Government's refusal to proceed to trial after its motions for continuances were denied.

I

The suppression order issue is very narrow: Are the district court's specific findings of prejudice from the destruction of evidence clearly erroneous? The simple answer is "no." In seeking to avoid this result, the majority has devised a hypothetical scale on which it weighs non-competing interests against one another, discovers that prejudice is not prejudice, and thereby announces a result in favor of the Government. I am unable to find any support for the majority's rationale either in prior case law or, if we were writing on a clean slate, in logic.

Three counts of the indictment were based on possession of a "destructive device." The material de-

stroyed included the very substance that the Government charged was the "destructive device."[1] None of the material was saved to permit independent testing of the substance.[2] The district court found that the destruction of the substance was prejudicial to the defendants because it prevented them from examining the primary evidence. The majority opinion concedes that the defendants did suffer prejudice from the destruction of the primary evidence, and it observes that "the secondary evidence is less reliable than chemical tests of the substance itself and that, as the explosive quality or no of the substance is an essential element of the offense, the loss of the evidence does bear upon an issue that lies at the core of the case." In short, the district court's finding of prejudice on this point is fully supported by the record. Under *United States v. Heiden* (9th Cir. 1974) (508 F.2d 898, which the majority acknowledges is undiminished as authority in this Circuit (Kennedy, J., Op'n at 1153 n.3), all appellate inquiry should end with "affirmed."

That result is unsatisfactory to the majority, and therefore, it is required to explain why the fact of prejudice is nevertheless not prejudice justifying

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[1] Thus, this case is unlike those in which corroborating, impeaching, or collateral evidence was destroyed. (*E.g., United States v. Harris* (9th Cir. 1976) 543 F.2d 1247 (FBI agent's rough notes destroyed; violation of Jencks Act); *United States v. Carrasco* (9th Cir. 1976) 537 F.2d 372 (informer's diary destroyed).)

[2] This facet distinguishes *Loud Hawk* from those cases where a sufficient sample was retained. (*E.g., United States v. Young* (9th Cir. 1976) 535 F.2d 484 (bulk of drug seizure destroyed but samples retained); *United States v. Heiden, supra*, 508 F.2d 898 (semble).

suppression. The majority opinion tells us that the prejudice is inadequate because the defendants did not make "any offer of proof from which the trier of fact might infer the substance was other than dynamite, and in this posture of the case the secondary evidence is a satisfactory substitute for a physical sample." As I translate this elliptical statement, the majority says that the defendants had the burden of proving that the substance destroyed was not dynamite, and if they failed to carry that burden, they could not claim prejudice from the destruction of the evidence. The reasoning is upside down. The defendants made a *prima facie* showing of prejudice and it is the Government's burden to show that the loss of the primary evidence was harmless. The destruction of the evidence, for which the Government is responsible, is the very act that makes identification of the substance impossible and thus creates the prejudice to the defendants. Thus, the majority opinion has inexplicably required the defendants to come up with proof that the Government itself has destroyed.

The majority opinion suggests that the defendants can nevertheless carry this impossible burden. "[S]econdary evidence is a satisfactory substitute for a physical sample" because it can be weighed against whatever defense argument can be made "that the substance was something other than from what all appearances it must have been." I do not know how to weigh this smoke, and I do not understand how either the defendants or the district court could have been expected to do so.

The district court found that "[d]efendants were also prejudiced by the destruction of the cartons and plastic bag which contained the dynamite in that

they were deprived of the opportunity to determine by fingerprinting who might have handled these items." (Findings of Fact at 5). The majority says that this finding is clearly erroneous because the fingerprint evidence "would not be exculpatory of necessity." (Kennedy, J., Op'n at 1155.) I am unable to follow the majority's reasoning. The presence or absence of fingerprints on the cartons would have been relevant to the issues. The destruction of the evidence prevented the defendants from being able to prove the absence of their fingerprints. The destruction also foreclosed the possibility of proving that persons other than the defendants handled the cartons and bags. The fact that fingerprint evidence would not "necessarily" have been exculpatory is irrelevant. The fact is inescapable that relevant evidence was destroyed, and the very act of destruction prevents anyone from determining how helpful that evidence might have been to the defendants.[3]

Prejudice stems from the fact that the Government prevented defendants from finding out for themselves. (*United States v. Tsutagawa* (9th Cir. 1974) 500 F.2d 420, 423 ("The thrust of *Mendez-Rodriguez* is to prevent the basic unfairness of allowing the government to determine which witnesses will not help either side and then to release those witnesses, for all practical purposes, beyond the reach of the

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[3] The Oregon State Police and the FBI attempted to take fingerprints from both vehicles and many of the objects within them. However, they did not attempt to discover fingerprints on either the plastic bags or the cardboard boxes, and the destruction therefore prevented those defendants not traveling in the station wagon from rebutting the dynamite counts with evidence that their fingerprints were not on the dynamite containers.

defendant. The vice lies in the unfettered ability of the government to make the decision unilaterally." (citation omitted)); *United States v. Mendez-Rodriguez* (9th Cir. 1971) 450 F.2d 1; *United States v. Bryant* (1971) 142 U.S. App.D.C. 132, 138, 439 F.2d 642, 648 ("Where *Brady* and its progeny applicable only when the exact content of the non-disclosed materials was known, the disclosure duty would be an empty promise, easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal." *Cf. Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.)

As we held in *Heiden, supra*, we will reverse a conviction when there has been a loss or destruction of evidence if the defendant can show "(1) bad faith or connivance on the part of the Government or (2) that he was prejudiced by the loss of the evidence." (508 F.2d at 902.) *A fortiori*, in reviewing an order to suppress, rather than a conviction, a showing of prejudice to the defendant from the destruction of evidence will sustain a suppression order, regardless of the purity of the governmental motives in destroying the evidence.

The majority opinion correctly recognizes that we are pursuing separate and distinctive interests in situations of this kind: deterring governmental misconduct, protecting a defendant's right to a fair trial, and preserving the integrity of the judicial process. None of these interests is appropriately protected by balancing one of these interests against the other. Each of these interests is independently important, and none of them can be weighed against the others. Thus, for example, we have no interest whatever in

injuring a defendant's right to a fair trial to reward government innocence in destroying evidence.[4]

The district court, on remand, particularly decided the facts implicating the Government's involvement in the investigation and apprehension of the defendants as well as governmental participation in the destruction of evidence. It specifically found that the Government acted in good faith, and it also found that the defendants were prejudiced by the destruction of the evidence. All of those findings are fully supported by the record, and we cannot reach a contrary conclusion unless we forthrightly admit that we are substituting our judgment for the judgment of the district court on these factual questions.[5]

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[4] I am unable to find support for the majority's balancing formulation from any of the cases cited from our Circuit or elsewhere. (*United States v. Higginbotham* (9th Cir. 1976) 539 F.2d 17 (negligent loss of photographs by state officers, in which federal officers played no part, did not deny due process); *United States v. Mays* (9th Cir. 1977) 549 F.2d 670 (insufficient showing of prejudice justifying dismissal of indictment for pretrial delay); *United States v. Picariello* (1st Cir. 1978) 568 F.2d 222 (citing *Heiden* in listing factors to consider without weighing any of them).)

[5] Brother Trask, in his separate opinion, argues that the federal Government was not sufficiently implicated in the destruction of evidence to warrant suppression. Both the facts as found by the district court specifically and the underlying record reveal that the investigation was a cooperative venture between federal and state law enforcement agencies from the start. To be sure, the search was physically conducted by state officers, and state officers undertook the physical destruction of the evidence. The FBI agents, who had advance notice of the destruction, were not simply bystanders during the event. The FBI's hands were displayed prominently throughout the transactions from the search through the destruction of the evidence, thus invoking the principles

II

The district court correctly dismissed with prejudice both the dynamite and firearms counts. I agree with the majority opinion that delay in prosecuting the defendants on the dynamite counts was not unnecessary under Rule 48(b), because the Government had a statutory right to appeal the suppression order as it applied to the dynamite counts. However, dismissal of the dynamite counts was appropriate on other grounds. Suppression of the secondary evidence was tantamount to a dismissal of the dynamite counts because, without that evidence, proof of the existence of the charged offense was lacking. Thus, outright dismissal of those counts would also have been appropriate. (*Cf. United States v. Roviaro* (1957) 353 U.S. 53, 77 S.Ct. 23, 1 L.Ed.2d 39 (trial court should have entered dismissal when Government suppressed information that was important to certain counts); *United States v. Reynolds* (1953) 345 U.S. 1, 12, 73 S.Ct. 528, 97 L.Ed. 727.)

As the majority recognizes, the non-dynamite firearms counts were properly dismissed because delay in prosecution had been unnecessary under Rule 48(b). The majority nevertheless reverses the district court's order on the ground that the Government had not been adequately warned that the dismissal would be with prejudice. The record shows that the prosecution had ample forewarning, and it made its own choice not to go forward on the non-dynamite counts.

The Government deliberately decided to submit to dismissal of the firearms counts, rather than to go to

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of *Lutig v. United States* (1949) 338 U.S. 74, 78, 69 S.Ct. 1372, 93 L.Ed. 1819; *Byars v. United States* (1927) 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520; *United States v. Bryant* (1971); 142 U.S.App.D.C. 132, 141, 439 F.2d 642, 651.

trial, because it erroneously believed that it had a right to appeal the suppression order as it related to the non-dynamite counts. The suppression order was entered on March 3, 1976. On April 19, 1976, the Government filed a notice of appeal and a motion requesting a continuance of the trial date, May 12, 1976. The district court denied the Government's motion for a continuance on April 20, 1976. On April 23, 1976, the Government informed the court that it would refuse to go to trial on May 12. On April 26, 1976, we denied the Government's motion for a continuance of the trial date. The Government then told the district court that it would suffer a dismissal, rather than go to trial, because it believed it would win the appeal. A government attorney told the court: "we will take our chances on getting this Court reversed by the Ninth Circuit with respect to that evidence and . . . will suffer a dismissal at this time if the Court should choose to do so rather than go to trial on the imperfect case that we would have to present if we were forced to trial now." (12 R.T. at 6 (April 26, 1976).) More than two weeks later, on the scheduled trial date, the case was called for trial and the Government refused to proceed. The district court then entered a dismissal with prejudice.

The crucial issue is whether the Government knew, or should have known, the consequences of its refusal to proceed to trial on the scheduled trial date. The record unmistakably establishes the prosecutor's knowledge that dismissal with prejudice was one of the consequences of a Rule 48(b) dismissal. (*United States v. Simmons* (9th Cir. 1976) 536 F.2d 827.) The prosecutor told the district court: "We believe the court lacks jurisdiction to dismiss this indictment with or without prejudice in view of the Govern-

ment's good faith intent [to appeal]." The majority opinion's conclusion that a dismissal with prejudice is an abuse of the district court's discretion under the circumstances is in conflict with our decision in *United States v. Charnay* (9th Cir. 1978) 577 F.2d 81.[6]

Nothing in *United States v. Simmons, supra,* supports the majority's view that a dismissal cannot be made with prejudice unless the district court gives the prosecutor formal on-the-record warning that a Rule 48(b) dismissal includes a dismissal with prejudice. On the contrary, *Simmons* itself indicates that the forewarning can come from sources other than the district court. Such sources include the district's speedy trial plan (536 F.2d at 837) or federal legislation (536 F.2d at 836 ("the [Speedy Trial] Act clearly forewarns the United States Attorney that he must comply with the applicable time limits or face the possibility that the indictment or information will be dismissed with prejudice.")).

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[6] In *Charnay,* we held that the district court did not abuse its discretion in dismissing with prejudice an indictment under Rule 48(b). The first continuance was requested by the Government to try to locate a missing witness. The court had told government counsel that if the witness was not located at the time the case was scheduled for trial, the indictment would be dismissed. Nothing was said about a dismissal with prejudice. On the date set for trial, the witness still had not been located and the Government renewed its request for a continuance to locate the witness. The court denied the motion and dismissed the indictment with prejudice. In upholding the district court, we said: "In these circumstances the court exercised all the requisite caution, and it was entirely proper for it to dismiss the indictment pursuant to Rule 48(b). Indeed, on this record, we doubt that any other prudent course was open to the trial judge." (577 F.2d at 84.)

The prosecutor knew that if he did not proceed to trial on the scheduled trial date, the case would be dismissed and that the district court had authority to dismiss it with prejudice. The prosecution's choice was both knowing and intelligent. To be sure, the strategy misfired because government counsel labored under a misapprehension of law relating to the right to appeal the suppression order affecting the non-dynamite counts. These events provide no legal foundation for relieving the Government of the consequences of the Government's exercise of prosecutorial discretion.

I would affirm.

ELY, Circuit Judge (dissenting):

I respectfully dissent.

While I thoroughly share all of the views of my Sister Hufstedler, my conscience impels that I set forth a few comments of my own. I do this reluctantly, even sorrowfully.

When our full court originally reviewed this appeal, all the judges then involved applied their dedicated efforts to the end that the difficult issues be correctly and justly resolved. The majority concluded that the district judge had not made critical findings, and had not reached critical conclusions, with required specificity. I disagreed, believing that the facts then before us proved, indubitably, that the challenged incriminatory evidence should have been suppressed. I repeat a portion of that which I wrote in dissenting from the majority's original unpublished *en banc* decision that the cause should be remanded:

> As I see it, the fact of the Government's active participation [in the destruction of critical evi-

dence] is beyond doubt. I say this for the following reasons:

> 1. The original apprehension of the vehicles was made by Oregon police upon notification by federal agents, pursuant to a federal warrant.
>
> 2. Federal agents attended the search for, and the removal of, the dynamite from one of the vehicles.
>
> 3. The instruction to destroy the material was issued by a state officer, one McCollum, and McCollum was not produced as a witness at the suppression hearing. From this the district judge could fairly draw the inference that McCollum had received this directions from federal officers.
>
> 4. At least one federal authority was present when the alleged explosive was destroyed, and there was no evidence whatsoever that he gave instructions, or made any rquest, that any samples be retained for analysis by the accuseds.

The last point, above enumerated, is of particular significance because of the defense contention that the substance had been extensively exposed to moisture and could not be detonated without the utilization of additional explosive material. We do not know whether such was necessary or utilized, and this failure of proof most certainly cannot be attributed to the appellees. In the circumstances therefore, I submit that the critical finding of active federal participation, uncontested, was supported by substantial evidence and, in fact, could not properly have been other-

> wise. I should add that warrants were executed by federal officers and that no state charges were instituted.

In any event, the majority's original decision to remand the cause so as to allow the district judge to engage in a more intricate exploration and issue the required determinations indicates to me that the majority then felt that, from the evidence relating to the issue of suppression, the ultimate conclusions could be either in favor of the appellants or in favor of the prosecution.

The district judge, after further review, supplied us with the guidance the majority originally thought to be desired. Now before us is a finding of fact which reads:

> Federal agents were present and aware of [Oregon State] Trooper Fettig's intended destruction of the dynamite and neither encouraged nor discouraged such action.
>
> Another critical finding is as follows: John O'Rourke, Special Agent in Charge of Oregon, was in Ontario before 'the dynamite was destroyed. He new [*sic*] that Beverly Axelrod, counsel for defendants was also in Ontario before the destruction of the dynamite. O'Rourke made no effort to inform Axelrod of the impending destruction of the dynamite, of which he was aware. Axelrod never asked O'Rourke to be allowed to witness the destruction of the dynamite. No representative of defendants witnessed the destruction.

And, of what ought to be of paramount significance, we now have the district judge's critical legal conclusion that:

Defendants were prejudiced to the extent that their inability to observe the destruction of the dynamite or to analyze samples of it deprived them of the opportunity to contest the government's conclusion that the substance destroyed was indeed explosive. Defendants' only argument on this point is now limited to analysis of the photographs of the destruction of the dynamite. The testimony of witness McCreary concerning the photographs of the destruction of the dynamite cast substantial doubt on the assertion that the photographs showed the detonation of dynamite. The fact that defendants were denied the opportunity to witness the destruction or to examine samples of the dynamite therefore appears to have prejudiced defendants substantially on the issue of the nature of the substance destroyed.

> Defendants were also prejudiced by the destruction of the cartons and plastic bag which contained the dynamite in that they were deprived of the opportunity to determine by fingerprinting who might have handled these items.

And now, what happens? Not only does the majority disregard the critical determinations of the district judge, but also it holds that the judge was clearly wrong in making a determination based upon conflicting testimony. In sum, the majority now does no more in affirming the convictions that it might have done upon the record before us in the original *en banc* proceedings. In fact it does less, for it accords absolutely no weight or deference to the careful review of the district judge upon remand and the guidance with which the district judge has now

favored us, and which, in the first *en banc* disposition, the majority wrote that it wanted. I do not asperse the good faith or the motives of any of my colleagues. All of them know that I hold each in the highest esteem. Notwithstanding, I record my belief that the proceedings in this appeal, with two hearings before the full court, and all the deliberations that followed, reflect a futile exercise.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 76-1906
76-2127

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS, who gives her true name as Kamook Banks; and ANNA MAE AQUASH, also known as Annie May Pictou and Naguset Eask, DEFENDANT-APPELLEES

Appeal from the United States District Court
for the District of Oregon

[Filed July 26, 1977]

Before: ELY, HUFSTEDLER, and TRASK, Circuit Judges

OPINION

HUFSTEDLER, Circuit Judge:

The Government appeals from orders suppressing evidence and dismissing with prejudice an indictment

against the appellees.[1] The district court suppressed secondary evidence because the Government participated in the deliberate destruction of primary evidence which, under the circumstances, deprived the appellees of due process of law. The district court dismissed the indictment because the Government refused to proceed to trial after the Government's motion to continue was denied.

The backdrop of this case is the battle of Wounded Knee and the heritage of violence and death that followed in its wake.[2] Banks and Peltier were active in the American Indian Movement, and both were fugitives when the events occurred from which this indictment stems. In early November 1975, an informant told the FBI about the fugitives' whereabouts and their travel plans. On November 13, 1975, the FBI's Portland office sent a teletype to all Oregon law enforcement officers stating that federal fugitives might be traveling through Oregon in a described motor home and a station wagon, the license numbers of which were given. The teletype also requested that, if sighted, the vehicles should not be stopped, but the FBI should be notified. On November 14, 1975, at 10 p.m., Oregon State trooper Griffiths saw the vehicles. He confirmed by radio that the license numbers

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[1] Defendant Anna Mae Aquash was killed while the case was pending below. Defendant Leonard Peltier was first a fugitive and then a prisoner in Canada resisting extradition during the time of the proceedings below. Thus, this appeal involves only defendants Loud Hawk, Redner, Nichols, and Banks.

[2] *See, e.g.*, United States v. Banks (D.S.D. 1973) 368 F. Supp. 1245; United States v. Banks, (D.S.D. 1974) 374 F. Supp. 321; United States v. Banks (D.S.D. 1974) 383 F. Supp. 389, *appeal dismissed,* (8th Cir. 1975) 513 F.2d 1329.

matched the teletype, asked for help, and stopped the motor home. When Griffitns pulled over the motor home, the station wagon stopped about 100 yards behind the trooper's car. Griffiths ordered the occupants of the motor home to step out, and, in response, an Indian man, two Indian women, and a small child emerged. In answer to Griffiths' inquiry, the Indians said that no one else was inside. Thereupon, the motor home sped forward, and the Indian male who was outside the vehicle ran toward a fence and fired a shot at Griffiths.

Meanwhile, the two occupants of the station wagon, Loud Hawk and Redner, were arrested by the backup officer, who had earlier arrived. The motor home was later found abandoned about one half mile from the site of the initial stop. Both vehicles were towed away and impounded in a commercial garage in Ontario, Oregon.

On the next day, November 15, 1975, state search warrants were obtained for the search of the two vehicles, and a search of the station wagon was begun. FBI agents were present during the search. Shortly after the start of the search, they discovered what appeared to be seven, fifty-pound cases of commercial dynamite. At this point the search was terminated pending the arrival of an Oregon State Police ("OSP") explosives expert. That evening Trooper Fettig, an OSP explosives expert, was told by his supervisor, Lieutenant McCollum, to remove and to dispose of the allegedly explosive material[3] found in

[3] The defendants stipulated, solely for the purpose of the motion to suppress, that the material was dynamite. We shall also refer to it as dynamite for the purpose of simplicity, recognizing that it was never established whether the material was or was not dynamite.

the station wagon. Fettig arrived in Ontario the next afternoon, November 16, 1975, inspected and disposed of the material. First, the garage was cleared of people except for Fettig and the FBI and OSP personnel who photographed the material located in the car. The seven cases were removed from the station wagon and placed in the trunk of Fettig's patrol car. The trunk was tied down and the material was placed on blankets. Two of the cardboard cases were quite wet, and one fell apart as it was being placed into the patrol car. Fettig transported the material to a pistol range 5 miles from Ontario.

Fettig removed two sticks from each case, removed their wrappers, scraped the wrappers clean, and retained the wrappers as evidence. The wrappers were handed to the FBI agent on the scene, and both OSP and FBI personnel photographed the process. Fettig detonated first one stick and then three additional sticks. The detonations were witnessed and photographed. The rest of the material—the cardboard cases, the plastic liners, and the remaining wrappers—was burned. This, too, was photographed. Part of the residue was buried, and part was hauled away by the Oregon Highway Department.

The superseding indictment charged all of the appellees with three counts relating to unregistered and unnumbered "destructive devices"[4] (the "dynamite counts") and with one count of interstate transportation of firearms bearing altered or obliterated serial

[4] They were charged with violations of 26 U.S.C. § 5861(d) (Count I); 26 U.S.C. § 5861(i) (Count II); and 26 U.S.C. § 5861(j) (Count II). The "firearms" in these counts were 26 U.S.C. § 5845(f) "destructive devices."

numbers[5] (the "firearms" count").[6] Evidence supporting the firearms count was discovered in the motor home; the evidence supporting the dynamite counts was discovered in the station wagon.[7]

On March 22, 1976, appellees moved to suppress all photographs, testimony, and other evidence relating to the destroyed dynamite. Both sides presented expert witnesses who testified about the handling of explosives. The Government's expert was Trooper Fettig. The person who made the decision and ordered the destruction of the dynamite, Lt. McCollum, did not testify. The Government also presented the photographs taken of the disposal process. Nichols, an FBI laboratory scientist, testified that his chemical analysis of the retained wrappers revealed all but one of the ingredients of the type of dynamite alleged in the indictment. The missing ingredient was the nitric ester, indicating nitrated ethylene glycol or its derivative, nitroglycerine.

After some further procedural skirmishing, the district court, on March 31, 1976, granted the sup-

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[5] Count IV charged a violation of 18 U.S.C. § 922(k).

[6] Count V charged Banks only with possession of firearms by one previously convicted of a felony; it alleged a violation of 18 U.S.C. App. § 1202(a).

[7] The federal search warrant, granted on November 16, 1975, applied to both vehicles. The federal search occurred subsequent to the state search, although FBI agents were present at both. The inventories attached upon return were not as clear as they could have been, but they indicate the components alleged to have been intended to be combined into a destructive device were in the station wagon. Besides, any uncertainty must be resolved against those executing the warrant and in favor of supporting the findings of the district court.

pression motion on due process grounds. The Government filed its appeal from the suppression order on April 19, 1976, and simultaneously sought a continuance of the May 12, 1976, trial date pending the determination of the appeal. The district court denied the continuance on the following day. When the case was called for trial on May 12, 1976, the Government answered not ready and advised the court that it was unwilling to proceed to trial. The district court thereupon dismissed the indictment with prejudice, pursuant to Rule 48(b) (Fed. R. Crim. P. 48(b)), and the Government filed its appeal from the order dismissing the indictment.

I

The Government first contends that it cannot be charged with responsibility for the destruction of the evidence because it did not have possession or control of it. "The Government," it says, "had nothing to do with the disposal process and could do little but try and record as much of the process as circumstances at the time would allow." The Government's modesty was not revealed to the district court, nor is it supported by the record. We could ignore the Government's argument because it is presented for the first time on appeal. However, we choose to address the question. The record reveals that the FBI was an active participant in all of these proceedings. The whole process was a cooperative federal-state effort. FBI agents were present during the searches and during the destruction of the evidence. They were neither disinterested bystanders nor casual reporters of the events that they witnessed; rather, they acted with the state officers in the destruction venture. The

district court's implicit finding of federal involvement is amply sustained by the record.[8]

Although the facts evidencing federal participation in the search and in the subsequent destruction of evidence are far stronger in this case than the activity of the federal official who was involved in the search considered in *Lustig v. United States* (1949) 338 U.S. 74, the language of *Lustig* is nevertheless instructive. In *Lustig*, the federal officer did not request the search nor was he the "moving force of the search, and that search was not undertaken by the police to help enforcement of a federal law. But search is a functional, not merely a physical, process. . . . Had Greene [the federal officer] accompanied the city police to the hotel, his participation could not be open to question even though the door of Room 402 had not been opened by him . . . . [A] search is a search by a federal official if he had a hand in it . . . ." (*Id.* at 78.) The FBI's hands were prominently displayed throughout the transactions from the search through the destruction of the evidence. Federal participation in the destruction of evidence should not be measured by a standard any different from that applied to the search for evidence considered in *Lustig*.

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[8] United States v. Higginbotham (9th Cir. 1976) 539 F.2d 17, and United States v. Trenary (9th Cir. 1973) 473 F.2d 680, are inapposite. In the former case, the Government did not enter the picture until after photographs, used by local police in an identification display, had vanished. In the latter, marijuana was destroyed by the Mexican police in Mexico. An American customs officer performed interpreting services. He did not have jurisdiction to assert any official authority in Mexico. The federal government's role and the activity of the customs officer in *Trenary* were not comparable to the situation in the case as bar.

II

The district court concluded from the evidence that the Government was chargeable with deliberately destroying material evidence,[9] which deprived the appellees of due process, from which violation prejudice to the appellees was presumed. Good faith of the officers in destroying the evidence did not prevent the due process violation, nor did it shift the burden of proving prejudice to the appellees. We agree with the district court.

Governmental participation in withholding, destroying, or causing the loss of evidence in a criminal case always has due process implications. The impact of a due process violation, including the selection of an appropriate remedy, involves consideration of a number of subjective and objective factors, including the deliberateness of the governmental conduct, the good or bad faith of the official, and the importance of the evidence to the defense of the case.[10] The more

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[9] The agents and troopers fully realized that evidence was being destroyed in contrast to the hospital technician in United States v. Sewar (9th Cir. 1972) 468 F.2d 236, 238, who did not realize that blood samples relevant to a drunk driving charge should be preserved. (*See also* United States v. Miranda (2d Cir. 1975) 526 F.2d 1319 (inadvertent or negligent loss); United States v. Carpenter (D.C. Cir. 1975) 510 F.2d 738 (negligence by company hired by court to transcribe preliminary hearing testimony); United States v. Bridges (7th Cir. 1974) 499 F.2d 179 (no showing that acetone swabbings deliberately destroyed).)

[10] *See* Comment, "Judicial Response to Governmental Loss or Destruction of Evidence" (1972) 39 U.Chi.L.Rev. 542, 563-65. *See generally* Clinton, "The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials" (1976) 9 Indiana L.Rev. 711, 829, 841-48.

intentional and inexcusable is the governmental conduct, the greater are the sanctions against the Government and the less is the burden on the defendant to show prejudice. When the Government intentionally destroys or causes the loss of evidence before or during trial, a due process violation emerges without any showing by a defendant that the challenged evidence would have helped him.[11] (*E.g., United States v. Tsutagawa* (9th Cir. 1974) 500 F.2d 420; *United States v. Mendez-Rodriguez* (9th Cir. 1971) 450 F.2d 1.) The Government's motives in destroying or causing the loss of evidence are only important in this setting to determine the severity of the sanction to be imposed on the Government. Thus, bad faith will require automatic reversal of a criminal conviction, or dismissal of an indictment. (*E.g., United States v. Keogh* (2d Cir. 1968) 391 F.2d 138; *see United States v. Gerard* (9th Cir. 1974) 491 F.2d 1300.) Good faith does not eliminate the due process violation (*United States v. Tsutagawa, supra,* 500 F.2d 420), but it is a factor to be taken into account in conjunction with other factors, such as the importance of the evidence to the defense, in assigning the burden of proving prejudice or nonprejudice and in fashioning an appropriate remedy for the violation. (*E.g., Brady v. Maryland* (1963) 373 U.S. 83;

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[11] Negligent or unintentional loss or destruction of evidence is not involved in our case. Thus, a number of cases on which the Government relies are not in point. (*E.g.,* United States v. Augenblick (1969) 393 U.S. 348 (Jencks Act material inadvertently lost); United States v. Sewar (9th Cir. 1972) 468 F.2d 236 (negligent failure to preserve blood sample relevant to drunk driving charge); United States v. Heiden (9th Cir. 1974) 508 F.2d 989, 903 ("[N]o evidence that the box and package of marijuana were not inadvertently destroyed. . . .").)

United States v. Young (9th Cir. 1976) 535 F.2d 484.)

No lengthy exegesis of prior authority is necessary in this case because neither the existence of the due process violation nor the propriety of the remedy applied involves any balancing of subtle factors. Part of the material destroyed was primary tangible evidence of the offense charged—the dynamite counts were all based on possession of an explosive, "destructive device."[12] None of the material was saved to permit independent testing of the substance.[13] The

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[12] The case is thus unlike those in which corroborating, impeaching, or collateral evidence was destroyed. (*E.g.,* United States v. Harris (9th Cir. 1976) 543 F.2d 1247 (FBI agent's rough notes destroyed; violation of Jencks Act): United States v. Carrasco (9th Cir. 1976) 537 F.2d 372 (informer's diary destroyed).)

[13] This facet distinguishes *Loud Hawk* from those cases where a sufficient sample was retained. (*E.g.,* United States v. Young (9th Cir. 1976) 535 F.2d 484 (bulk of drug seizure destroyed but samples retained); United States v. Heiden (9th Cir. 1974) 508 F.2d 898 (semble); United States v. Shafer (7th Cir. 1971) 445 F.2d 579, 582 (samples from each container of powder made available to defense); *cf.* United States v. Rojas (5th Cir. 1974) 502 F.2d 1042 (cassette tape of drug sale damaged by tape malfunction, defendant given opportunity to have tape repaired by his own expert). *See also* United States v. Pollock (D. Mass. 1975) 402 F. Supp. 1310 (cocaine possession charge, defendant granted access to sample to have independent chemical analysis performed); United States v. Hrubik (D. Alaska 1968) 280 F. Supp. 481 (defendant granted access to water sample for independent testing); United States v. Taylor (E.D.N.Y. 1960) 25 F.R.D. 225 (sale of narcotics charge, access to sample granted for defense analysis); Note, "The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine," 75 Colum. L.Rev. 1355 (1975).

Government also participated in destroying cartons and containers that may have had fingerprints or other indicia by which those who handled the items could have been identified.[14] The secondary evidence could not and did not preserve the evidence destroyed. Here, as in *United States v. Tsutagawa, supra*, 500 F.2d 420, the Government deliberately, though in good faith, effectively destroyed material and potentially material evidence without notice to the prospective defendants or their counsel. The Government sought no court order directing the destruction.

The Government contends that no due process violation was proved and that suppression of the secondary evidence was incorrect because its good faith destruction of the evidence was reasonable to protect the public safety and because the appellees did not establish prejudice. The district court was not persuaded that the dynamite provided any substantial threat to public safety. Lt. McCollum, who made the destruction decision, did not testify. "Without such testimony," the district court appropriately concluded, "the only evidence presented was that the dynamite was no more dangerous or sensitive than 'normal' dynamite and that the water soaked sticks were less sensitive, if anything, than 'normal' dynamite." A commercial magazine was available in which to store the dynamite, and the OSP had a vehicle which could

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[14] The OSP and FBI attempted to take fingerprints from both vehicles and many of the objects within them. However, they did not attempt to discover fingerprints on either the plastic bags or the cardboard boxes, and the destruction therefore prevented those defendants not traveling in the station wagon from rebutting the dynamite counts with evidence that their fingerprints were not on the dynamite containers.

safely transport one and one half cases of explosives at a time the 60 mile distance to the magazine. In short, the Government failed to prove that this dynamite posed any more danger to the public than other kinds of weaponry that can be transported and stored pending trial. The public safety feature is, of course, irrelevant to the destruction of the liners and containers. We thus have no occasion to decide whether the public interest in safety so far outweighs a defendant's interest in access to material evidence that a defendant's due process right must yield, at least in absence of his proving prejudice.

In this pretrial proceeding, we agree with the district court that prejudice to the appellees from the destruction of the evidence is presumed under the circumstances of this case.[15] As we have pointed out, destruction of all of the substance that was the very foundation of the dynamite counts cannot reasonably be described as nonprejudicial. As to the cartons and liners, the Government's own acts made it impossible

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[15] Harmless error doctrines are inapposite in this pretrial context. The effect of the loss of the evidence upon the defendant is not of the factors taken into consideration in deciding whether a due process violation has occurred. It is double counting to inquire whether the destruction was harmless, or even harmless beyond a reasonable doubt, when harm is presumed to establish the due process violation. (*See, e.g.*, Field, "Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale" (1976) 125 U.Pa. L.Rev. 15, 29.) By the same token cases reviewing harmfulness after a conviction are not helpful. (E.g., Killian v. United States (1961) 368 U.S. 231; United States v. Henry (9th Cir. 1973) 487 F.2d 912; United States v. Shafer (7th Cir. 1971) 445 F.2d 579; United States v. Bryant (D.C. Cir. 1971) 439 F.2d 642; Munich v. United States (9th Cir. 1966) 363 F.2d 859.)

for the appellees to ascertain what could have been discovered from an examination of them. The Government offered no excuse at all for destroying them. A presumption of prejudice in favor of the appellees is the only means available to protect them from the unfairness that inheres in the Government's unilateral choice in placing that evidence completely beyond the appellees' and the court's reach. (*Cf. Brady v. Maryland, supra*, 373 U.S. 83; *United States v. Tsutagawa, supra*, 500 F.2d 420.)

III

Suppression of the secondary evidence was tantamount to a dismissal of the dynamite counts because, without that evidence, proof of the existence of an explosive, a necessary element of the offense, was lacking. Outright dismissal of those counts would also have been appropriate. (*Cf. United States v. Roviaro* (1957) 353 U.S. 53; *United States v. Reynolds* (1953) 345 U.S. 1, 12.)

The Government argues that the district court erred in dismissing the remaining counts of the indictment when the Government refused to proceed to trial on them. We have the same difficulty as did the district court in understanding the basis for the Government's contention that the district court could not force the Government to trial on the non-dynamite counts because to do so would destroy its right to appeal from the suppression order.[16] But, even if

[16] "THE COURT: I am ready to try the case commencing today. Both parties have had ample time to prepare. The defendants are ready to go to trial. For some reason, which I do not understand, the Government is not, even though two of the counts are not concerned with the subject of previously suppressed evidence. [13 R.T. at 4-5 (May 12, 1976)].

"....

"THE COURT: ....

... this dismissal of the indictment is with prejudice, unless the Ninth Circuit decides otherwise and remands the case or some part of it for trial.

....

"[Assistant to U.S. Attorney]: ... we believe the Court lacks jurisdiction to dismiss this indictment with or without prejudice in view of the Government's good faith intent—

"....

"THE COURT: ... nothing that I have done or intend to do here will in any way prevent the Court of Appeals from ruling on my order to suppress and indeed reinstate this case for trial as to all five counts.

"....

"[U.S. Attorney]: ....

"... the Government disagrees with the Court's conclusion that the evidence which has been suppressed is not appropriate for introduction or consideration in the remaining counts. Part of the reason we are not going ahead with the trial now is that the Government's view and theory of this case is [that the] evidence which is suppressed bears directly upon motive and intent particularly as well as upon the veracity of the balance of the Government's case with respect to the remaining counts." (*Id.* at 8-13.)

The Government argument seems to be that the certification provisions in section 3731 permit the prosecution to determine what counts of a multi-count indictment involve suppressed evidence. In view of the requirement that the statute is to be narrowly construed so as to avoid creation of new categories of appeals (*see* United States v. Sisson (1970) 399 U.S. 267), we do not think the Government is entitled to an appeal concerning what is, in effect, the question of admis-

there were a foundation for that contention, it would not help the Government because the Government deliberately chose to submit to the dismissal of the re-

maining counts rather than to go to trial.[17] Moreover, the district court exercised both the caution and provided the forewarning of impending dismissal required by *United States v. Simmons* (9th Cir. 1976) 536 F.2d 827.[18]

AFFIRMED.

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sibility of the dynamite evidence at a trial of the firearms count. If the issue had arisen at trial and if the evidence were excluded, the Government would have no appeal. (*Id.* at 291-99.) The relevant portion of section 3731 was intended to permit appeals of the suppression issue, not appeals of evidence issues concerning the suppressed evidence's relevancy or admissibility at trial. The overriding purpose of Congress to rationalize the law of suppression is not served by appeals involving points of evidence law. (*Cf.* United States v. Towill (9th Cir. 1977) 548 F.2d 1363, 1368 (denial of Government motion to dismiss indictment not appealable). *See generally* 114 Cong. Rec. 16297-98 (1968) (remarks of Rep. Pollack that § 3731 incorporates language of H.R. 8654, 90th Cong., 1st Sess. (1967)); 113 Cong. Rec. 24947 (1967) (remarks of Rep. Railsback, sponsor of H.R. 8654, indicating need for appellate resolution of inconsistent trial court rulings). See also H.R. Rep. No. 603, 90th Cong., 1st Sess. (1967).)

[17] "[U.S. Attorney]: [W]e will take our chances on getting this Court reversed by the Ninth Circuit with respect to that evidence and . . . will suffer a dismissal at this time if the Court should choose to do so rather than go to trial on the imperfect case that we would have to present if we were forced to trial now." (12 R.T. at 6 (April 26, 1976).)

[18] There was no surprise because the Government itself suggested dismissal on April 26, 1976, but refused to move for it for fear of mooting its suppression appeal. (12 R.T. at 5-7). The court proceeded cautiously in view of the facts that the Government had designated the defendants as "high risk" on February 20, 1976 (3 C.T. at 472), and that the District of Oregon Speedy Trial Act Plan might not have

TRASK, Circuit Judge, dissenting:

I respectfully dissent.

In its first assignment of error, the government contends that the district court incorrectly granted appellees' motion to suppress all photographs, testimony, and other evidence relating to the destroyed dynamite.[1] The government argues that it was not responsible for the destruction of the dynamite and therefore should not be penalized by suppression. Assuming *arguendo* that it was responsible for the destruction, the government argues that suppression was improper under the established law of this circuit. It is the government's contention that to justify suppression, the district court must find either that the government destroyed the evidence in bad faith or that the defendants are prejudiced by the destruction. As neither fact was established below, the government argues that the district court erred in granting appellees' motion to suppress.

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allowed any extension beyond the 90 day limit. (18 U.S.C. § 3164(b); United States District Court for the District of Oregon, Plan for the Prompt Disposition of Criminal Cases, III §§ 7(a), 10 (1976).) Given these speedy trial concerns even unconditional dismissal of all counts of the indictment was not an obvious error. (United States v. Cox (9th Cir. 1973) 475 F.2d 837, 841.)

[1] The majority takes the position that the explosive material was never established as dynamite. I merely note that (1) the material in the seven cases was labeled "Explosives Dangerous, Gelex 2, 70% strength, Dupont," (2) all of the witnesses referred to the explosive material as "dynamite," and (3) the cases containing the material were labeled "High Explosives Dangerous" and were identified by expert Fettig on visual examination as containing dynamite. Even more conclusively, it exploded on detonation.

The government's contention that it did not have possession or control of the dynamite evidence is meritorious. The initial stop on the highway took place on November 14, 1975. This was entirely a state operation.[2] It immediately developed into a shooting skirmish and escape into the darkness on the part of two of the persons in the motor home before any preliminary questioning should take place. The vehicles were subsequently impounded by the state. On Saturday, November 15, state search warrants were obtained and executed by state officials.[3] Items found in the two motor vehicles included seven cases of dynamite, semi-automatic rifles, police shotguns, handguns, more than 2,600 rounds of ammunition, 150 blasting caps, nine pineapple empty training hand grenades, pocket watches prepared to detonate time bombs, batteries, and wire.

As a result of the discovery of the dynamite in the seized vehicles, a call was made by Lieutenant McCollum, commander of the arson division of the Oregon State Police, to William Fettig, an explosives expert with the Oregon State Police. McCollum was Fettig's superior officer. He ordered Fettig to pro-

[2] The only possible federal participation was an FBI "all points bulletin" issued November 13, 1975, to be on the lookout for these two motor vehicles. However, the bulletin expressly stated that the vehicles were not to be stopped. The state officer who stopped the vehicles disregarded this instruction.

[3] As noted by the majority in its footnote 7, the FBI made a separate search of the subject vehicles pursuant to a federal search warrant. The federal warrant was obtained and the federal search conducted subsequent to the issuance and execution of the state search warrant. This fact, bolsters rather than detracts from the position that the state and federal authorities were acting independently of each other.

ceed to Ontario, Oregon to destroy the dynamite. Acting under these orders, Fettig drove to Ontario on November 16. After reporting to the Oregon State Police office in Ontario, Fettig proceeded to the place where the station wagon was being held and, in his words, "opened the driver's right rear door and noticed in the inner compartment of the station wagon, with the seats laid down, that in a greenish-black visquine bag there was dynamite." Officer Fettig next transferred the dynamite from the station wagon to the trunk compartment of his patrol car. He then drove to a pistol range five miles from the city with a patrol car ahead of him and one behind him. At that remote place, some of the dynamite was detonated and the remainder burned.[4] Pictures were taken by Oregon State Police and FBI personnel of the dynamite detonation and burning.

A detailed examination of the records available in this case reveals that the FBI was not a participant in the search for and destruction of evidence. The record establishes that the evidence was seized by *state* officials pursuant to *state* search warrants after the vehicles in question were stopped by *state* law enforcement agents. Further, the record indicates that

[4] In the process of destroying the dynamite, Fettig removed the wrappers from several of the sticks of dynamite and scraped the wrappers clean. Seven of these wrappers, coupled with a "do's and dont's" pamphlet concerning the safe use of dynamite and which was found with the seized explosives, were introduced as evidence at the hearing on appellees' motion to suppress. Also introduced as evidence at the hearing was the testimony of David W. Nichols, a qualified expert employed by the FBI. Nichols testified concerning the chemical composition of the substance scraped from the dynamite wrappers. Nichols was available for and was subjected to cross-examination.

the evidence remained in the hands of *state* officials until *state* authorities determined that the evidence should be destroyed. Finally, the record reveals that it was a *state* law enforcement officer who destroyed the evidence. An FBI agent was present at the destruction of the evidence. However, mere attendance does not justify the creation of a federal-state partnership through which the actions of state agents become imputable to their federal counterparts. The FBI agent in attendance took photographs of the evidence and its destruction. However, such activities appear clearly to involve the preservation of evidence, not its destruction. Therefore, I believe that the majority's broad characterization of the federal agents as joint venturers in the destruction of the evidence cannot withstand scrutiny.

The majority relies on *Lustig v. United States*, 338 U.S. 74 (1949), in arguing that the government was responsible for the destruction of the evidence. *Lustig*, a search and seizure case, is factually distinguishable from the instant case. In *Lustig*, a Secret Service Agent received word from local police that they suspected a counterfeiting operation was going on in a room of a local hotel. The local police obtained a search warrant and entered the room while the Secret Service Agent, Greene, remained at the police station. Upon discovery of evidence of federal counterfeiting crimes, Greene was notified by the local police. He went to the hotel and examined the evidence in controversy. The Court held that the illegal search conducted by the local police was imputable to the federal agent.

> "Though state officers preceded Greene in illegally rummaging through the bags and bureau drawers in Room 402, they concerned themselves

> especially with turning up evidence of violations of the federal counterfeiting laws after Greene joined them. He was an expert in counterfeiting matters and had a vital share in sifting the evidence as the search proceeded. He exercised an expert's discretion in selecting or rejecting evidence that bore on counterfeiting. The fact that state officers preceded him in breach of the rights of privacy does not negative the legal significance of this collaboration in the illegal enterprise before it had run its course. Greene himself acknowledged such participation by his remark about 'leaving the room after we had gathered all this evidence together.'" *Id.* at 79.

The federal officer in *Lustig* actively participated in the search which the city police illegally began. Here, however, the federal officer's only activity in the entire series of events was to preserve as much evidence of the dynamite as possible. The decisions regarding what to do with the dynamite, where to do it, and when, were entirely and exclusively made and carried out by the Oregon State Police.

The majority's characterization of *United States v. Higginbotham*, 539 F.2d 17 (9th Cir. 1976), and *United States v. Trenary*, 473 F.2d 680 (9th Cir. 1973), as inapposite cannot be supported. In *Higginbotham*, the appellant was convicted on a Dyer Act charge. Shortly after appellant's arrest, an officer of the Boise, Idaho Police Department put together a photographic display composed of 18 photographs, one of which was of appellant. During pretrial proceedings, appellant's photograph was readily identified from among the pictures constituting the display. At trial the display could not be produced because it had been broken up and the pictures re-

turned by local police to their files. Before this court, appellant complained that the failure to produce the display denied him due process. The contention was rejected, Judge Kilkenny stating:

> "Here is a proper place to emphasize that the fifteen photographs were never in the possession of the prosecutor, the FBI or any other United States government agency. The Boise police, under these facts, cannot be said to be acting on behalf of the federal government but rather on behalf of the State of Idaho. *Cf. United States v. Smith*, 433 F.2d 1266 (CA5 1970). Under such circumstances we should be reluctant to impute to the federal government the mistakes, particularly relatively innocent ones, committed by local police. Moreover, the demand to produce these photographs might well be likened to an attempt to require production under the Jencks Act of statements in the possession of state police. See *Beavers v. United States*, 351 F.2d 507 (CA9 1965), where the statements were never in possession of the United States and production was not required. By analogy, it is evident that the United States is in no way responsible for the actions of the Boise police in disposing of the fifteen photographs by inadvertance or otherwise." *Id.* at 21.

In the present case, the two motor vehicles and the dynamite were likewise never in the possession of the federal authoriites. The state police had its own policy for handling dynamite in situations such as this and proceeded to follow that policy. Even assuming that the dynamite could have been handled in a different and possibly better way, Officer Fettig

was under orders to proceed as his superiors commanded and his actions cannot be charged to have been taken in bad faith.[5]

United States v. Trenary, supra, involved an appeal from a conviction for conspiracy to import marijuana from Mexico. The marijuana and duffle bags containing it had been destroyed by the Mexican police before trial. There being no charge of bad faith or negligence by the United States, secondary evidence was admissible at the trial. *Trenary* is another example of the refusal of this court to impute to the federal government the loss or destruction of evidence by other authorities over whom it has no authority or control.

In summary, I find that the record cannot support a finding of federal involvement in the destruction of the dynamite by state officials. As the government was not responsible for the destruction, I would follow the case law of this circuit (*United States v. Higginbotham, supra*, and *United States v. Trenary, supra*) and hold that the district court erred in suppressing the photographic and testimonial evidence of the destroyed dynamite. Therefore, I would reverse the order of the district court granting appellees' motion to suppress and would remand the cause with instructions to deny appellees' motion.

Assuming *arguendo* that responsibility for the destruction of the evidence can be imputed to the federal government, the government argues that the district court ignored established case authority in ruling favorably on appellees' motion to suppress. I agree.

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[5] The trial court expressly found that "[t]here was no evidence that the destruction in this case was in bad faith . . . ." Order Suppressing Evidence at 5.

The law of this circuit governing the present controversy is clear. When the government loses or destroys tangible evidence prior to trial, a motion to suppress photographic, testimonial, or other evidence related thereto will be granted by the trial court if defendant can show: (1) bad faith or connivance on the part of the government, or (2) that he was prejudiced by the loss of the evidence. *United States v. Sewar*, 468 F.2d 236 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); see also *United States v. Young*, 535 F.2d 484, 488 (9th Cir. 1976); *United States v. Heiden*, 508 F.2d 898, 902 (9th Cir. 1974); *United States v. Henry*, 487 F.2d 912 (9th Cir. 1973): Both the district court and the majority here on appeal fail to apply the test of *United States v. Sewar* and its progeny. Instead, the majority sanctions the substitution by the district court of a new standard: the possible prejudice to a criminal defendant caused by the destruction of evidence is balanced against the government's reasons for the destruction.[6]

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[6] The trial court's rationale on the presumption of prejudice created by the destruction of the dynamite is unique. The court stated:

> "Balancing the possible prejudice to the defendants against the government's reasons for the destruction, I must find in favor of the defendants. Because of this destruction, it is impossible for the defendants to show that they have been prejudiced but neither can the possibility of such prejudice be rebutted. In this situation, a presumption of such prejudice is created. This presumption, however, can be outweighed by valid reasons for the kind of destruction that took place here." Order Suppressing Evidence at 4.

Such reasoning escapes me. It appears to be a *non-sequitur*. No authority is cited for this rationale.

The majority, while never explicitly rejecting the established rule of this circuit, does attempt to distinguish several of the cases which have used the rule. The majority observes that the destruction in the present case was accomplished by agents who understood that the destroyed materials would be important to subsequent criminal proceedings. Additionally, the majority notes that no samples of the destroyed evidence were retained by the agents. According to the majority, these factors, alone or in combination, distinguish the instant case from those cases which have applied the *Sewar-Heiden* test.

The distinctions drawn by the majority are without significance. The recent case of *United States v. Young, supra*, applied the *Sewar-Heiden* test to a situation in which it was obvious that the government agency destroying the evidence understood its value to future criminal proceedings. In *United States v. Henry, supra*, and *United States v. Sewar, supra*, government agents destroying the evidence failed to preserve samples; yet the *Sewar-Heiden* test was applied in both cases. It is clear from the case law in this area that the distinctions offered by the majority have never affected the applicability of the *Sewar-Heiden* test.

Applying the *Sewar-Heiden* test to the facts of the present controversy, I find that appellees established neither that the government acted in bad faith in destroying the dynamite nor that appellees were prejudiced by the destruction. The trial court's findings accord with my views. The trial court expressly held that "[t]here was no evidence that the destruction in this case was in bad faith . . . ." Order Suppressing Evidence at 5. In addiiton, the trial court also held that appellees failed at the suppression hearing to

establish that they were actually prejudiced by the destruction.[7] The trial court went further, however, and presumed prejudice to appellees from the fact of the destruction.

The presumption of prejudice introduced by the trial court was improper. None of this court's decisions dealing with the destruction of evidence sanction such a presumption. Instead, all make an inquiry into the destruction to ascertain whether the defendants were prejudiced thereby. *See, e.g., United States v. Young, supra,* at 488; *United States v. Heiden, supra,* at 903; *United States v. Henry, supra,* at 913; and *United States v. Sewar, supra,* at 238. Not only is a case-by-case examination for prejudice the established practice of this circuit, but it is also far superior to a blanket presumption in reaching just results. Presuming prejudice from the fact of destruction in effect nullifies the *Sewar-Heiden* test. The fact of destruction leads to a presumption of prejudice. Prejudice requires suppression. Defendants automatically prevail; the government always loses; the issue of justice is ignored. Clearly, the presumption of prejudice has no place in the application of the *Sewar-Heiden* test.

Having determined that the trial court improperly presumed prejudice, and further noting that the trial court expressly found that the government did not destroy the evidence in bad faith and that appellees failed to establish that they were prejudiced thereby, I find that suppression is not mandated under the *Sewar-Heiden* test. Therefore, even assuming *arguendo* that the federal government was responsible

[7] Specifically, the trial court declared: "[I]t is impossible for the defendants to show that they have been prejudiced . . . ." Order Suppressing Evidence at 4.

for the destruction of the evidence, I would reverse the order of the district court granting appellees' motion to suppress and would remand the cause with instructions to deny appellees' motion.

In its second assignment of error, the government contends that the district court incorrectly dismissed the indictment against appellees. The district court's order dismissing the indictment was founded on Rule 48(b) of the Federal Rules of Criminal Procedure. That rule authorizes the court to dismiss an indictment whenever there has been "unnecessary delay in bringing a defendant to trial." The government argues that the delay in prosecuting appellees has not been "unnecessary," and consequently that the district court abused its discretion in dismissing the indictment. Assuming *arguendo* that the district court did not err in dismissing the indictment, the government contends that the court below did err in dismissing the indictment with prejudice. While dismissal with prejudice is authorized by Rule 48(b), the government points out that such power is to be utilized with caution and only after a forewarning to the prosecution that dismissal with prejudice will result from a failure to proceed to trial. *United States v. Simmons,* 536 F.2d 827, 834 (9th Cir. 1976). The government argues that the trial court failed both to exercise the requisite caution and to provide the required forewarning, and thus improperly dismissed the indictment with prejudice.

In examining the government's second assignment of error, the merits of its arguments are best demonstrated if the dynamite and nondynamite counts are analyzed separately.

The dynamite counts. The delay in prosecuting appellees on the dynamite counts has not been unneces-

sary under Rule 48(b). The government had a statutory right to appeal the suppression order as it applied to the dynamite counts. The delay has been necessary to permit the meaningful exercise of that statutory right.

The government has been granted the right by statute to appeal suppression orders entered by the district court. That right is set forth in 18 U.S.C. § 3731. Section 3731 provides in pertinent part:

> "An appeal by the United shall lie to a court of appeals from a decision or order of a district court suppressing . . . evidence . . . not made after the defendant has been put in jeopardy . . . if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding."

The government's right to appeal is available conditionally. First, the appeal is not available if the defendant has been put in jeopardy. Second, the appeal must not be taken for purpose of delay. Third, the evidence suppressed must be substantial proof of a fact material in the proceeding. Clearly, these conditions were met in the context of the dynamite counts. (1) Appellees have yet to be placed in jeopardy. (2) The appeal was not taken for purpose of delay. The delay in bringing appellees to trial was necessary to permit the government to effectively exercise its statutory right to appeal. If the government had been forced to proceed to trial on these counts pending the outcome of the appeal, jeopardy would have attached, the appeal would have become moot, and the government's right to appeal the suppression order would have been effectively denied.

(3) The suppressed evidence was critical in establishing a necessary element of the alleged offenses, the existence of an explosive device.

In summary, the government had a statutory right to appeal the suppression order if certain conditions were met. Those conditions were satisfied as to the dynamite counts. Delay was necessary to permit the government to effectively take its appeal. Clearly, such a delay, necessary to give effect to a statutory right, cannot be deemed "unnecessary" for purposes of Rule 48(b). Therefore, I would hold that the district court erred in dismissing the dynamite counts pursuant to Rule 48(b); I would reverse that portion of the district court's order dismissing these counts; and I would remand the cause to the district court with instructions to reinstate the indictment as to these counts. Because I would rule that the dynamite counts were improperly dismissed, it is unnecessary for me to examine whether the two-pronged test of *United States v. Simmons*, *supra*, was met to justify dismissal of these counts with prejudice.

The majority, in sustaining the district court's dismissal of the dynamite counts, does not rely on the district court's erroneous application of Rule 48(b). Instead, the majority observes that suppression of the evidence was tantamount to dismissal of the dynamite counts because an essential element of the dynamite counts was not incapable of proof. My disagreement with the majority's approach is simple. I believe that the suppression order was improperly granted.

The nondynamite counts. The delay in prosecuting appellees on the nondynamite counts of the indictment has been unnecessary for Rule 48(b) purposes. As previously discussed, the government's right (via

section 3731) to appeal a district court's order suppressing evidence is conditional. One of the conditions is that the evidence suppressed must be substantial proof of a fact material in the proceeding. This condition must be met before appeal of the suppression order can properly be taken. Despite the government's protests to the contrary, the suppressed evidence is not substantial proof of any material fact in the nondynamite counts of the indictment. The trial court found as much. (13 R.T. at 5.) Given the government's failure to satisfy this condition, its appeal of the suppression order as it relates to the nondynamite counts was improper and the delay in prosecution occasioned by this appeal has been unnecessary under Rule 48(b). Therefore, I would find that the court below properly dismissed these counts of the indictment.

Having determined that the trial court properly dismissed the nondynamite counts of the indictment, I turn now to the propriety of dismissing those counts with prejudice. In *United States v. Simmons, supra,* at 834, this circuit held that even though dismissal with prejudice is authorized by Rule 48(b), trial courts should utilize such power with caution and only after a forewarning to the prosecution that dismissal with prejudice will result from a failure to proceed to trial. The government argues that the requisite caution and forewarning required by *Simmons* were absent in the trial court's dismissal of the nondynamite counts with prejudice.

Taking the prongs of the *Simmons* test in reverse order, I find the record devoid of any forewarning to the prosecution that the nondynamite counts of the indictment would be dismissed with prejudice. The district court's entry dismissing these counts contains no reference to a forewarning of impending dismissal wth prejudice. The remainder of the record is equally as barren.

The majority, notwithstanding the state of the record, attempts to create the requisite forewarning from a declaration made by the United States attorney at a hearing conducted several days prior to dismissal. At the hearing the government counsel observed: "[W]e will suffer a dismissal at this time if the Court should choose to do so rather than go to trial on the imperfect case that we would have to present if we were forced to trial now." (12 R.T. at 6.) This statement is touted by the majority as sufficient forewarning to satisfy the requirement of *Simmons.* The majority, in making such a claim, is plainly in error. First, the statement was made by the government, not the trial court. It is the trial court that is required to forewarn the prosecutor, not vice versa. Second, and far more important, the government's statement indicates that it was prepared to suffer dismissal. Nothing is said concerning its preparedness to suffer dismissal with prejudice. As indicated in *Simmons,* at 837, it is not enough to forewarn that dismissal may result from a failure to proceed to trial. Rather, the prosecution must be forewarned that the dismissal will be with prejudice.

Having determined that the trial court failed to provide the required forewarning to the prosecution, it is unnecessary to examine whether the court exercised caution in dismissing the nondynamite counts with prejudice. The test in *Simmons* is two-pronged, and failure to satisfy either prong is sufficient to warrant reversal of the order dismissing with prejudice. Given the failure of the trial court to provide the forewarning mandated by *Simmons,* I would re-

verse that portion of the trial court's order dismissing the nondynamite counts with prejudice and would remand the cause to the district court for further consideration of its dismissal of these counts in light of this opinion.

In conclusion, I would reverse the orders of the district court granting appellees' motions to suppress and to dismiss the indictment with prejudice. Further, I would remand the cause to the district court with instructions: (1) to deny appellees' motion to suppress, (2) to reinstate the indictment as to the dynamite counts, and (3) to reconsider its dismissal of the nondynamite counts with prejudice in light of this opinion. Therefore, I respectfully dissent.

/s/ Ozell E. Trask
United States Circuit Judge

APPENDIX E

UNITED STATES DISTRICT COURT
D. OREGON

CR No. 75-296-RE

UNITED STATES OF AMERICA, PLAINTIFF

v.

KENNETH MOSES LOUD HAWK, ET AL., DEFENDANTS

May 20, 1983

OPINION

REDDEN, District Judge:

Defendants Kenneth Loud Hawk, Russ James Redner, Dennis Banks, and KaMook Banks move to dismiss this action on the grounds that their Sixth Amendment right to a speedy trial has been violated. For the reasons set forth below, I grant defendants' motion and dismiss this action with prejudice.

I. *Background*

The facts leading to the arrest and ultimate indictment of the defendants in this case are fully set forth in *United States v. Loud Hawk*, 628 F.2d 1139

(9th Cir. 1979), *cert. denied*, 445 U.S. 917, 100 S.Ct. 1279, 63 L.Ed.2d 602 (1980). Therefore, only a brief recitation of those facts is necessary here.

Defendants Loud Hawk, Redner, and KaMook Banks were arrested by Oregon state police officers on November 14, 1975. These officers impounded the vehicles the defendants were driving and on November 15, 1975 searched the vehicles pursuant to a search warrant. The search disclosed firearms, ammunition, an electric blasting cap, a large quantity of non-electric blasting caps, and material thought by state police to be dynamite. State authorities, without notice to the defendants, destroyed the alleged explosive material on November 16, 1975.

A federal grand jury returned a ten count indictment against defendants Loud Hawk, Redner, KaMook Banks, Dennis Banks,[1] and two other individuals on November 25, 1975, charging all defendants with one count of possession of an unregistered destructive device, eight counts of possession of firearms whose serial numbers had been removed, and charging Dennis Banks alone with one count of being a felon in possession of firearms. On December 22, 1975, a five count superceding indictment was filed. Two days later defendants filed a motion seeking dismissal of the indictment, or alternatively, suppression of any and all evidence relating to the destroyed dynamite. They argued that the destruction of the evidence constituted a denial of due process since there was no opportunity for defense analysis of the material and the evidence was destroyed before defendants had any chance to object or suggest alternatives.

[1] Defendant Dennis Banks was a fugitive until his arrest in California. He made his first appearance on April 13, 1976.

On March 30, 1976, Judge Belloni granted this motion to suppress. He reasoned that destruction of the dynamite prejudiced defendants because "their inability to observe the destruction and to analyze samples of it deprived them of the opportunity to contest the government's conclusion that the substance destroyed was indeed explosive." He also found that defendants were prejudiced because destruction of the packaging material foreclosed the defense from determining by fingerprint analysis who had handled the boxes.

The government filed its notice of appeal from this order on April 19, 1976. At the same time, the government requested a continuance of the trial date of May 12, 1976, pending resolution of the interlocutory appeal. The government argued that the suppressed evidence was highly relevant to the firearms counts which were to be tried on May 12. Judge Belloni denied the motion for continuance on April 20, 1976. On April 23, 1976, the government moved the Court of Appeals for an order continuing the May 12 trial date. The government based its motion on the same grounds rejected by Judge Belloni. The Court of Appeals also denied the motion for continuance.

At a status conference on April 26, 1976, the government informed Judge Belloni that it would not proceed to trial on the firearms counts. When the case was called for trial on May 12, 1976, the government answered that it was not ready to proceed. All defendants answered that they were ready for trial. In fact, the defendants demanded that trial proceed or that the court dismiss the case with prejudice pursuant to Fed.R.Crim.P.48(b). They argued that their rights under the Speedy Trial Act and the Constitution had been violated.

In response to the motion to dismiss, Judge Belloni stated:

> I think everyone here realizes that this case will be dismissed against these defendants. Both this Court and the Court of Appeals has denied any postponement. I am ready to try this case commencing today. Both parties have had ample time to prepare. The defendants are ready to go to trial. For some reason, which I do not understand, the Government is not, even though two of the counts are not even concerned with the subject of previously suppressed evidence. I do not want to dismiss this case without a trial. The factual and legal dispute should be heard and decided, but there is no way the Court can force the Government to call its witnesses. My only recourse is to dismiss this case against these four defendants.
>
> Clearly, there has been unnecessary delay in bringing these four defendants to trial. Clearly it is the fault of the Government.

Transcript of Proceedings, May 12, 1976, at 4-5. The government admitted that it could have tried the firearms counts without the suppressed evidence. Indeed, the government stated that if the Court of Appeals affirmed the suppression order, it would proceed to trial on the firearms counts. Transcript of Proceedings, May 12, 1976, at 15-16. Judge Belloni, pursuant to Fed.R.Crim.P. 48(b), dismissed the indictment with prejudice.

The government filed its notice of appeal from the dismissal in open court on May 12, 1976.[2] Transcript

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[2] It is interesting to note that, while the Court of Appeals held that the government did not have adequate notice that the indictment would be dismissed, the government had already prepared a notice of appeal which it immediately presented to the trial court in the presence of the defendants.

of Proceedings, May 12, 1976, at 12. On June 11, 1976, the appeals of the suppression order and the order dismissing the indictment were consolidated. The appeals were submitted to a panel of the Ninth Circuit on October 15, 1976. On July 26, 1977, the panel affirmed Judge Belloni's orders. The government petitioned for reconsideration *en banc* on September 7, 1977. The Court granted the government's petition on October 17, 1977.

On March 6, 1978, the Court *en banc* temporarily remanded to the district court for an evidentiary hearing. Judge Belloni held this hearing on May 9 and 10, 1978. At the end of the hearing, Judge Belloni ordered the parties to file proposed findings within two weeks. On June 16, 1978, Judge Belloni granted the government's motion to extend the filing date to July 14, 1978. The record does not indicate the reason why, but the parties did not file their proposed findings until August 1, 1978. Judge Belloni issued findings on the factual issues on August 23, 1978.[3] On August 7, 1979, the Ninth Circuit *en banc* reversed the suppression order and the dismissal of the firearms counts of the indictment to the extent that the dismissal was with prejudice. *Loud Hawk*, *supra*, 628 F.2d 1139. The Court held that dismissal of the firearms counts was proper, but held that the court had failed to give the government the requisite

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[3] During the time this case was on temporary remand, the District of Oregon was entitled to five trial judges. Until 1980, however, the District of Oregon had only three trial judges. In 1980, two additional district court judges were appointed.

"forewarning . . . that dismissal with prejudice will result from a failure to proceed to trial." *Id.* at 1150. The Court of Appeals remanded with instructions to deny the motion to suppress, to reinstate the indictment, and to reconsider the dismissal with prejudice of the non-dynamite counts. After petitions for rehearing and certiorari were denied, the mandate issued on March 12, 1980.[4]

Upon remand, the case was assigned to me. I ruled that the firearms counts could not simply be reinstated. Therefore, the government obtained a superceding indictment from the Grand Jury on June 18, 1980. This indictment recharged defendants with the original firearms count and two of the three original destructive device counts. The new indictment recharged Dennis Banks with being a felon in possession of firearms. The superceding indictment also charged all defendants with two new destructive device counts and charged KaMook Banks with a new count of receiving firearms while under indictment for a felony.

This new indictment prompted motions to dismiss for vindictive prosecution. On August 8, 1980, I dismissed the superceding indictment as to KaMook Banks on the grounds of vindictive prosecution. I denied similar motions on behalf of the other defendants. In August 1980, defendants Loud Hawk, Redner, and Dennis Banks appealed the denial of their motions to dismiss for vindictive prosecution. On September 2, 1980, the government appealed the dismissal as to KaMook Banks. The appeals were consolidated in September 1980 and submitted to a panel of the Ninth Circuit in November 1980.

[4] At the time the Court of Appeals issued the mandate, four years, three months and 16 days had passed from the date of the indictment.

On July 29, 1982, a panel of the Ninth Circuit dismissed the appeals of Redner, Loud Hawk, and Dennis Banks for lack of jurisdiction on the grounds that the denial of a motion to dismiss for vindictive prosecution was not an appealable order.[5] The Court vacated the dismissal of Counts I through V of the indictment as to KaMook Banks. The Ninth Circuit issued the mandate on January 31, 1983.[6]

By minute order on February 25, 1983, trial was set to commence on April 11, 1983. At the request of the government, and over objections by the defendants, I continued the trial date to May 3, 1983. On the court's own motion, trial was continued from May 3, 1983 to May 23, 1983 and finally set to begin on June 13, 1983. Defendants objected to each continuance.

[5] On March 6, 1980, a panel of the Ninth Circuit held that an order denying a defendant's motion to dismiss on the grounds of vindictive prosecution was immediately appealable as a final decision under 28 U.S.C § 1291. *United States v. Griffin*, 617 F.2d 1342 (9th Cir.), *cert. denied*, 449 U.S. 863, 101 S.Ct. 167, 66 L.Ed.2d 80 (1980). This holding was subsequently reversed by the United States Supreme Court in *United States v. Hollywood Motor Car Co., Inc.*, —— U.S. ——, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982) (*per curiam*). The Ninth Circuit panel then dismissed the appeals of Loud Hawk, Redner, and Dennis Banks based on *Hollywood Motor Car Co. United States v. Banks*, 682 F.2d 841, 844 (9th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 755, 74 L.Ed.2d 972 (1983).

[6] When the mandate from the second appeal was received, seven years, two months and six days had passed from the date of the indictment.

II. *Discussion*

The government contends that this case presents issues of delay encompassing both the Fifth Amendment Due Process Clause and the Sixth Amendment Speedy Trial Clause. The government claims that the approximately four year period between the dismissal on March 12, 1976 and the return of the mandate—which reinstated the indictments—on May 17, 1980 should be scrutinized under the Due Process Clause. Likewise, for KaMook Banks, the government argues that the period between her second dismissal on August 8, 1980 and the return of the mandate vacating that dismissal on January 31, 1983 must be considered under the Due Process Clause.

The defendants contend that the entire period of delay from the date of the indictment to the date of trial, approximately seven years and seven months, must be analyzed under the Speedy Trial Clause.

The Speedy Trial Clause of the Sixth Amendment only applies when a defendant is "accused." *United States v. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 1501, 71 L.Ed.2d 696 (1982). The right to a speedy trial "attaches only when a formal criminal charge is instituted and a criminal prosecution begins." *Id.* A defendant is "accused" for Speedy Trial Clause purposes when he or she has been arrested, indicted, or is otherwise the subject of a criminal prosecution. *Id.*

The United States Supreme Court held in *MacDonald* that "the Speedy Trial Clause has no application after the Government, in good faith, formally drops charges." *Id.* The Court, however, was not faced with, and did not decide, the situation at issue here: whether a person is "accused" during the time a court's dismissal of the indictment, on defendants' motion, is on appeal.

I conclude that the *MacDonald* rationale does not extend to dismissals which are not voluntary by the government. I find that a person is "accused" even after a court dismisses the indictment if the government appeals the dismissal. This is because, on appeal, the dismissal may be reversed and the indictment reinstated. A person remains under prosecution unless and until the court on appeal affirms the dismissal. *See United States v. Bishton*, 463 F.2d 887, 891 (D.C. Cir. 1972) (prosecution ended only upon affirmance of dismissal by court of appeals).

The Court in *MacDonald* noted that its conclusion agreed with the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174. *United States v. MacDonald*, *supra*, 456 U.S. at 7 n. 7, 102 S.Ct. at 1501 n. 7. It noted that the Act specifically provides that if charges are dismissed by the government and later refiled, the period between the dismissal and refiling is not included in computing the time within which trial must begin. 18 U.S.C. § 3161(h)(6). My conclusion also comports with the Speedy Trial Act. The Act, while recognizing that dismissals may occur upon a defendant's motion, does not provide that excludable delay occurs from the date of dismissal to reinstatement of the indictment on appeal. Rather, the Act allows excludable delay only if the indictment is dismissed "upon motion of the attorney for the Government . . ." *Id.*

The fundamental difference between a dismissal by the court and a voluntary dismissal by the government is also shown by Fed. R. Crim. P. 48. Rule 48(a) provides that the prosecution of a defendant terminates upon dismissal by the government. The Rule does not provide, however, that the prosecution terminates upon dismissal by the court for unneces-

sary delay. The logical inference from the difference in language between the two subsections of Rule 48 is that a prosecution does not necessarily terminate upon dismissal by the court.

In this case, there has been but one prosecution during these past seven years. Almost immediately after Judge Belloni issued his order dismissing the indictment on May 12, 1976, the government handed the Judge its notice of appeal from that dismissal. The defendants, who were in court when the United States Attorney handed the Judge the notice of appeal, knew that the dismissal could be overturned on appeal. During the almost four years the case was on the first appeal, the defendants suffered the anxiety of knowing that the dismissal could be reversed at any time and the indictment reinstated. They were not in the same position as a person whose indictment is voluntarily dismissed by the government. As to that person, the government must go before another Grand Jury if it ever wishes to reindict him or her. As to these defendants, the indictment was merely held in abeyance. In fact, after the first appeal, the Court of Appeals reinstated the dynamite counts of the indictment and ordered reconsideration of the dismissal of the non-dynamite counts. Upon remand, I concluded that the non-dynamite counts could not simply be reinstated. The government then obtained a superceding indictment from the Grand Jury, recharging the defendants with the original firearms count and two of the three original destructive device counts, along with other new counts. On the second appeal, the Court of Appeals vacated the dismissal of Counts 1 through V as to KaMook Banks. Thus, as to KaMook Banks it is as if the second dismissal never occurred. The government cannot argue that

she was not "accused" during the pendency of the second appeal. On the second appeal, the indictment had not been dismissed as to Loud Hawk, Redner, and Dennis Banks. They, therefore, also remained "accused" during the pendency of the second appeal.

In summary, I conclude that the entire time between arrest or indictment of the defendants in this case and the time now set for trial must be analyzed under the Sixth Amendment Speedy Trial Clause rather than under the more stringent standard of the Due Process Clause.[7] These defendants have been

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[7] Where the delay occurs before indictment or during a time when the defendant is not considered "accused" for purposes of the Speedy Trial Clause, any delay is evaluated under the Due Process Clause and the defendant bears a heavier burden to establish a constitutional violation. *United States v. Henry*, 615 F.2d 1223, 1232 (9th Cir. 1980). Preaccusation delay is permissible "unless it violates 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" *Id.* Under the Due Process analysis, the court must consider the reasons for the delay as well as the prejudice to the defendant. Affirmative proof of actual prejudice is necessary under the Due Process analysis. An affirmative showing of actual prejudice is not necessary, however, to prove a Speedy Trial Clause violation. *Moore v. Arizona*, 414 U.S. 25, 26, 94 S.Ct. 188, 189, 38 L.Ed.2d 183 (1973); *United States v. Henry, supra*, 615 F.2d at 1232 n.12. Under the Due Process analysis, the defendant's proof of actual prejudice must be "definite and not speculative." *Arnold v. McCarthy*, 566 F.2d 1377, 1384 (9th Cir. 1978). The focus in the Due Process analysis is on the nature of the actual prejudice caused by the delay and the legitimacy of the asserted governmental reasons for the delay. *Id.* at 1384 n. 1.

I conclude that, even if the government is correct and the stricter Due Process standard applies to part of the delay in this case, defendants' constitutional rights have been violated. While the case presents a closer question when

under indictment from November 25, 1975 to the present.

The United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972), enunciated the test for determining whether a defendant's Sixth Amendment right to a speedy trial has been violated:

> The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed. A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.
>
> . . . We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must

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analyzed solely under the Due Process Clause, I would still dismiss. As noted *infra*, the governmental reasons for the delay do not absolve the government of its duty to bring these defendants to trial in a timely fashion. Also, as noted *infra*, I find the defendants have made an affirmative showing of actual prejudice which is "definite and not speculative." *Id.* at 1384.

> still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Id. at 530 and 533, 92 S.Ct. at 2192 and 2193 (footnotes omitted).

Defendants argue that the delay in this case of seven years and seven months violates the Speedy Trial Clause as a matter of law. I decline to so rule, rather I examine this case in light of the four factors enunciated in *Barker*. I conclude that, in the circumstances of this case, the defendants' rights under the Speedy Trial Clause of the Sixth Amendment have been violated.

A. *Length of the delay*

The delay from indictment to the time this case will come to trial is seven years, six months, and 19 days. The government argues that I should exclude the period of six years and three months when this case was on appeal. The government notes that this time period would be excludable under the Speedy Trial Act, 18 U.S.C. § 3161(h)(1)(E). It cites a Fifth Circuit Court of Appeals opinion in support of its argument that the delay while the case was on interlocutory appeal should not be included in determining the length of delay for Speedy Trial Clause purposes. *United States v. Herman*, 576 F.2d 1139 (5th Cir. 1978). *Herman*, however, does not support the government's position. In *Herman*, the Fifth Circuit merely held that "[a]n interlocutory appeal by the

government is generally a valid reason that justifies an appropriate delay." *Id.* at 1146. The court noted that "delays to seek interlocutory appeals may not be justified in every case . . . ." *Id.* at 1147.

I follow the Fifth Circuit's analysis. I hold that the proper analysis is to include delay occasioned by interlocutory appeals in the computation of the length of the delay. The fact that the delay occurred because of interlocutory appeals can be accounted for when analyzing the reasons for the delay. This conclusion is in accord with Ninth Circuit precedent. *See United States v. Osuna-Sanchez*, 446 F.2d 566, 567 (9th Cir. 1971), *cert. denied*, 404 U.S. 1022, 92 S.Ct. 698, 30 L.Ed.2d 672 (1972) (six month delay justified).

The length of delay is a triggering device. *Barker*, *supra*, 407 U.S. at 530, 92 S.Ct. at 2192. There is no set amount of delay which is presumptively prejudicial; the length of delay necessary to invoke Speedy Trial Clause inquiry depends upon the peculiar circumstances of each case. *Id.* at 531, 92 S.Ct. at 2192. In this case, the ninety-one month delay between indictment and trial is sufficient to trigger scrutiny under the Sixth Amendment.

B. *Reasons for the Delay*

The government bears the burden of justifying the delay. *Barker*, *supra*, 407 U.S. at 531, 92 S.Ct. at 2192. The parties agree that a major portion of the delay in this case is due to the two interlocutory appeals. The government attempts to justify the delay incurred on the first appeal by noting the "complexity of the issues raised, the en banc hearing . . . , the necessity for a remand for an evidentiary hearing and the fact that defendants exhausted every possible

avenue on appeal." [8] These arguments, however, do not justify the length of the delay occasioned by the first appeal. The Ninth Circuit, *en banc*, held that the delay for interlocutory appeal of the explosives count could not be deemed unnecessary for purposes of Fed. R. Crim. P. 48(b). The Court, however, did hold that

> [the government's] appeal of the suppression order as it relates to the nondynamite counts was improper and delay in prosecution occasioned by this appeal has been unnecessary under Rule 48(b).

United States v. Loud Hawk, *supra*, 628 F.2d at 1150. Since the appeal was improper, the delay is not justifiable and weighs against the government. *See*, *Barker*, *supra*, 407 U.S. at 531, 92 S.Ct. at 2192; *United States v. Herman*, *supra*, 576 F.2d at 1146.

The government does not address the twenty-nine month delay occasioned by the second appeal. The length of this delay is troubling since this appeal, like the first appeal, was on an expedited basis. The length of the delay is also troubling because it comes on the heels of the four year delay occasioned by the first appeal. To state that the delay was the result of appellate review does not absolve the government of the duty under the Sixth Amendment to give these defendants a speedy trial. The federal government as a whole—executive, judicial, and legislative—is governed by the strictures of the Speedy Trial Clause. All three branches of government have a duty to in-

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[8] While the government asserts that the delay should be attributed to the defendants because "they exhausted every possible avenue on appeal," I note that it was the government which petitioned for rehearing *en banc*, not the defendants.

sure that rights of criminal defendants to speedy trials are not abrogated. *Dickey v. Florida*, 398 U.S. 30, 51, 90 S.Ct. 1564, 1575, 26 L.Ed.2d 26 (1970) (Brennan, J., concurring).[9] The twenty-nine month delay also weighs against the government, since "the ultimate responsibility for [delays occasioned by crowded courts] must rest with the government rather than the defendant." *Barker*, *supra*, 407 U.S. at 531, 92 S.Ct. at 2192. *See Brown v. Wolff*, 706 F.2d 902 at 906 (9th Cir. 1983) (crowded docket not good cause for continuance of Interstate Agreement on Detainers case).

The government argues that the time this case has been pending before this court—approximately fifteen months—must be attributed to the defendants. The government points to the "phrenetic motion practice" of the defendants' attorneys. The record does reflect that defendants have filed numerous pretrial motions. Nonetheless, of the motions filed, several were well taken and raised important issues. Furthermore, even if all the delay before this court is attributed to the defendants, there still exists the unjustified delay of six years and three months.

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[9] I note that during the first appeal in this case, the Ninth Circuit Court of Appeals was understaffed by thirteen judges. This understaffing necessarily led to delays and a backlog of cases on appeal. This backlog has been remedied by the appointment of thirteen new judges. Appeals before the Ninth Circuit are now current. While the delay in the two interlocutory appeals can be labeled the fault of Congress for not fully staffing the Ninth Circuit sooner, the delay must still weigh against the government. As Justice Brennan noted in *Dickey*, 398 U.S. at 52 n. 18, 90 S.Ct. at 1577 n. 18: "If the legislature were to refuse to install sufficient judicial machinery to perform judicial tasks, it might be necessary to turn some accused persons loose." (*Quoting King v. United States*, 265 F.2d 567, 569 (D.C. Cir. 1959)).

C. *Defendants' Assertion of Their Rights*

Defendants moved for dismissal of the indictment on the grounds of unnecessary delay as early as May 12, 1976. Upon remand after the first appeal, defendants moved for dismissal on the grounds of unnecessary delay and for denial of their Sixth Amendment right to a speedy trial. After the second appeal, defendants again moved to dismiss on the grounds of undue delay. Since the last remand, defendants have objected to every continuance of the trial date. I find that defendants have asserted their speedy trial rights. Their assertions of their rights "is entitled to strong evidentiary weight in determining whether the defendant[s are] being deprived of the right." *Barker*, *supra*, 407 U.S. at 531-32, 92 S.Ct. at 2192-93.

D. *Prejudice to the Defendants*

An affirmative showing of actual prejudice is not necessary to prove a Speedy Trial Clause violation. *Moore v. Arizona*, 414 U.S. 25, 26; 94 S.Ct. 188, 189, 38 L.Ed.2d 183 (1973); *United States v. Henry*, 615 F.2d 1223, 1232 n. 12 (9th Cir. 1980). The Supreme Court in *Barker* held that prejudice should be assessed in light of the interests the Speedy Trial Clause protects:

> This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired . . . . If witnesses die or disappear during a delay, the prejudice will be obvious. There is also prejudice if defense witnesses are unable to recall accurately events of

> the distant past. . . . Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.

Barker, supra, 407 U.S. at 532 and 533, 92 S.Ct. at 2193.

Defendants have made a sufficient showing of prejudice. It is true that defendants have not been incarcerated for the past seven years. Nonetheless, defendants Redner and Loud Hawk did spend eighty-seven days in custody and KaMook Banks spent ninety-nine days in custody. The record reflects that Dennis Banks was briefly in custody, but it does not reflect the length of his incarceration. Defendants concede that the length of time each of them has spent in custody is not excessive. Nonetheless, the length of time each defendant has lived with these unresolved criminal charges—over seven and one-half years—is excessive. The Supreme Court has consistently noted the substantial nature of this type of prejudice. *MacDonald, supra,* 456 U.S. at 8-9, 102 S.Ct. at 1502; *Barker, supra,* 407 U.S. at 533, 92 S.Ct. at 2193; *United States v. Marion,* 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971).

The defendants have also shown that the delay has impaired their ability to defend themselves. By affidavit they have shown that a number of defense witnesses have died. The affidavits of defendants' attorneys show that these witnesses would have testified favorably for the defendants.[10] Also, one of the original codefendants, Anna Mae Aquash, has also died.

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[10] The affidavit of S. Lynn Parkinson, attorney for defendant Redner, was submitted *in camera*. The government requested access to this affidavit in order to rebut the claim of actual prejudice. The affidavit records Redner's theory of the defense without setting forth any factual allegations which the government could refute. Therefore, at the request of the defendant, I did not reveal this affidavit to the government.

> While it is true . . . that the record does not indicate whether the testimony of this witness would have been helpful, or even available to the [defendants, I] cannot gainsay that it would not have been. Certainly the death of a witness with firsthand knowledge of the events at issue creates the strong possibility of prejudice to a defendant.

United States v. Macino, 486 F.2d 750, 754 (7th Cir. 1973). Defendants have also shown through the affidavit of their investigator that at least two witnesses have no independent recollection of the events of November 1975. Affidavit of Donald K. Grant.

I conclude that defendants have shown not only the possibility of prejudice stemming from the delay, they have established actual prejudice which is "definite and not speculative." *Arnold v. McCarthy,* 566 F.2d 1377, 1384 (9th Cir. 1978). As such, defendants' proof of prejudice even meets the more stringent requirements under the Due Process Clause analysis.

III. *Conclusion*

In light of the above, I find that the four *Barker* factors, when weighed together, compel the conclusion that these defendants' Sixth Amendment right to a speedy trial has been violated. The extreme length of the delay coupled with the actual prejudice shown and the lack of any articulated justifiable reason for the delay mandate that the indictment against

these defendants be dismissed. I note that this case, like all Speedy Trial Clause cases, is *sui generis* and my decision rests on the peculiar circumstances of this case. As indicated earlier, the government insists that most of the delay in this case must be examined under the Due Process Clause which requires a finding of definite and not speculative prejudice. Although I disagree with the government that the Due Process test applies, even when the delay is so tested I conclude that dismissal is proper. The indictment is dismissed with prejudice as to all defendants.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CR No. 75-296

UNITED STATES OF AMERICA, PLAINTIFF

v.

KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS and DARLENE PEARL NICHOLS, also known as Kamook Banks, DEFENDANTS.

[Filed Aug. 12, 1980]

AMENDED ORDER

Page 1-2, 3, lines 1-22 of the Order dated August 8, 1980 is amended as follows:

MOTION TO DISMISS FOR VINDICTIVE PROSECUTION

A defendant has the initial burden to show a "mere appearance of vindictiveness." *United States v. Griffin*, 617 F.2d 1342, 1347 (9th Cir. 1980). Once this showing has been made, the burden shifts to the Government to show that its decision was "justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness." *Id.*

While I conclude there is no evidence that the Government's action was vindictive *in fact*, the Government has failed to dispel the *appearance* of vindictiveness as to KaMook Banks.

A mere appearance of vindictiveness is a very strict standard to overcome. *Griffin, supra*, 617 F.2d at 1346. It is not necessary, nor did I find, that the Government acted with a malicious or retaliatory motive. *Id.* There is also no evidence in the record that the prosecutors took this action because of any personal bias or animosity toward any of the defendants or their attorneys.

After the mandate was returned from the Ninth Circuit, the Government contended that there was "no justifiable purpose" served in refusing to reinstate the non-dynamite counts; the Government was content to proceed under the 1975 Indictment. At that time, the Government knew that KaMook Banks was under indictment for a crime punishable by imprisonment for a term exceeding one year in the United States District Court for the District of Kansas.

The Defendants contended that the counts should not be reinstated; if the Government was to proceed, the Grand Jury should be asked to reindict.

After hearing argument on this issue, this court refused to reinstate the counts.

The Government then submitted the evidence to the Grand Jury, and on June 17, 1980, a superseding Indictment was returned. Count VII charged KaMook Banks with receipt of firearms while under indictment for a crime punishable by imprisonment for a term exceeding one year. This crime was not charged in the earlier indictment.

I find that as to KaMook Banks, defendants have made a prima facie showing, and the Government has failed to dispel the appearance of vindictiveness.

The Government, at the time it requested reinstatement of the counts, knew that KaMook Banks was under indictment in the District of Kansas; it also knew that the crime she was charged with was punishable by imprisonment for a term exceeding one year. The Government, however, did not submit this information to a Grand Jury. Rather, it was willing to proceed on the 1975 Indictment.

It was only after defendants opposed reinstatement, and the court ordered reindictment, that the Government submitted the evidence to the Grand Jury, and KaMook Banks was indicted for the additional charge.

The Government's evidence was not sufficient to dispel the appearance of vindictiveness. It merely contended that it was only after June 10, 1980, that the Government learned KaMook Banks was charged with a violation of 18 U.S.C. § 922(g) (interstate transportation of firearms by a person under indictment). However, the fact that the Government did not know the precise charge that KaMook Banks was indicted for its irrelevant. It did know, as early as 1976, that KaMook Banks was under indictment for a crime punishable by imprisonment for a term greater than one year. That information was sufficient to charge her with a violation of 18 U.S.C. § 922(h) then. There were no independent reasons or intervening circumstances which dispelled the appearance of vindictiveness.

Defendants Dennis Banks, Loud Hawk and Redner allege that the Government added additional charges, additional counts and an additional destructive de-

vice to the 1980 Indictment. They allege that the reason for these new charges, counts and devices is prosecutorial vindictiveness. I disagree.

The prosecutor has wide discretion in choosing which charges to bring against a particular defendant. *Griffin, supra,* 617 F.2d at 1346.

After this court ordered the Government to resubmit the non-dynamite counts to the Grand Jury, the prosecutors reviewed the legal and factual background for each of the charges in the 1975 Indictment. The prosecutors also reviewed the physical evidence.

After this review of the facts, the law and the physical evidence, and after discussions with an explosive expert and the FBI, the Government decided to drop some counts from the 1975 Indictment and add new charges to the 1980 Indictment.

The decision of the Government to drop certain charges and add new charges was an objective decision based upon an analysis of the facts. It was a product of independent judgment of subsequent prosecutors. *Hardwick v. Doolittle,* 558 F.2d 292, 301 (5th Cir. 1977), *cert. denied,* 434 U.S. 1049 (1978); *United States v. Ricard,* 563 F.2d 45, 48 (2nd Cir. 1977), *cert. denied,* 435 U.S. 916 (1978).

I, therefore, find that as to defendants Dennis Banks, Loud Hawk and Redner, the Government's decision was justified by independent reasons and intervening circumstances which dispel the appearance of vindictiveness. *Griffin, supra,* 617 F.2d at 1347.

In summary, while I conclude there is no evidence that the Government's action was vindictive *in fact,* the Government has failed to dispel the *appearance* of vindictiveness as to KaMook Banks. The motion to

dismiss is denied except as to defendant KaMook Banks.

Dated this 12th day of August, 1980.

/s/ James A. Redden
JAMES A. REDDEN
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CR No. 75-296

UNITED STATES OF AMERICA, PLAINTIFF

v.

KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS and DARLENE PEARL NICHOLS, also known as Kamook Banks, DEFENDANTS.

[Filed Aug. 8, 1980]

ORDER

MOTION TO DISMISS FOR VINDICTIVE PROSECUTION

A defendant has the initial burden to show a "mere appearance of vindictiveness." *United States v. Griffin*, 617 F.2d 1342, 1347 (9th Cir. 1980). Once this showing has been made, the burden shifts to the Government to show that its decision was "justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness." *Id.*

While I conclude there is no evidence that the Government's action was vindictive *in fact*, the Govern-

ment has failed to dispel the *appearance* of vindictiveness as to KaMook Banks.

A mere appearance of vindictiveness is a very strict standard to overcome. *Griffin, supra*, 617 F.2d at 1346. It is not necessary, nor did I find, that the Government acted with a malicious or retaliatory motive. *Id.* There is also no evidence in the record that the prosecutors took this action because of any personal bias or animosity toward any of the defendants or their attorneys.

After the mandate was returned from the Ninth Circuit, the Government contended that there was "no justifiable purpose" served in refusing to reinstate the non-dynamite counts; the Government was content to proceed under the 1975 Indictment. At that time, the Government knew that KaMook Banks was under indictment for a crime punishable by imprisonment for a term exceeding one year in the United States District Court for the District of Kansas.

The Defendants contended that the counts should not be reinstated; if the Government was to proceed, the Grand Jury should be asked to reindict.

After hearing argument on this issue, this court refused to reinstate the counts.

The Government then submitted the evidence to the Grand Jury, and on June 17, 1980, a superseding Indictment was returned. Count VII charged KaMook Banks with receipt of firearms while under indictment for a crime punishable by imprisonment for a term exceeding one year. This crime was not charged in the earlier indictment.

I find that as to KaMook Banks, defendants have made a prima facie showing, and the Government has failed to dispel the appearance of vindictiveness.

The Government, at the time it requested reinstatement of the counts, knew that KaMook Banks was under indictment in the District of Kansas; it also knew that the crime she was charged with was punishable by imprisonment for a term exceeding one year. The Government, however, did not submit this information to a Grand Jury. Rather, it was willing to proceed on the 1975 Indictment.

It was only after defendants opposed reinstatement, and the court ordered reindictment, that the Government submitted the evidence to the Grand Jury, and KaMook Banks was indicted for the additional charge.

The Government's evidence was not sufficient to dispel the appearance of vindictiveness. It merely contended that it was only after June 10, 1980, that the Government learned KaMook Banks was charged with a violation of 18 U.S.C. § 922(g) (interstate transportation of firearms by a person under indictment). However, the fact that the Government did not know the precise charge that KaMook Banks was indicted for is irrelevant. It did know, as early as 1976, that KaMook Banks was under indictment for a crime punishable by imprisonment for a term greater than one year. That information was sufficient to charge her with a violation of 18 U.S.C. § 922(h) then. There were no independent reasons or intervening circumstances which dispelled the appearance of vindictiveness.

In summary, while I conclude there is no evidence that the Government's action was vindictive *in fact*, the Government has failed to dispel the *appearance* of vindictiveness as to KaMook Banks. The motion to dismiss is denied except as to defendant KaMook Banks.

MOTION TO DISMISS FOR PRE-INDICTMENT DELAY

The motion is denied.

Defendants have not demonstrated that the pre-indictment delay violated the Due Process Clause. *United States v. Lovasco*, 431 U.S. 783 (1977); *Arnold v. McCarthy*, 566 F.2d 1377 (9th Cir. 1978). There was also no showing of a violation of the Sixth Amendment. *Barker v. Wingo*, 407 U.S. 514 (1971); *Arnold, supra.*

SECOND MOTION IN LIMINE

The motion as to defendant Dennis Banks is denied. Fed. R. Evid. 403; *United States v. Peltier*, 585 F.2d 314, 321 (9th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979). Because of my ruling on the motion to dismiss, this motion as to KaMook Banks is moot.

The motion as to evidence relating to the search for and attempt to arrest defendants Banks and Peltier is granted in part. The Government may only introduce evidence of events which occurred at the scene of the alleged crime.

MOTION TO DISMISS COUNTS III AND IV FOR INSUFFICIENT ALLEGATIONS

The motion is denied. *United States v. Loud Hawk*, Nos. 76-1906, 76-2127 (9th Cir. August 7, 1979); *United States v. Oba*, 448 F.2d 892 (9th Cir. 1971).

MOTION TO SUPPRESS PHOTOGRAPHIC IDENTIFICATION AND POTENTIAL TAINTED COURTROOM IDENTIFICATION

The motion is denied.

First, the motion was not timely filed. Fed. R. Crim. P. 12(c). The basis for this motion was known to defendants for at least 5 years.

Second, even assuming that the motion was timely filed, co-defendants do not have standing to suppress the identification of Peltier. *See United States v. Cella*, 568 F.2d 1266, 1280-82 (9th Cir. 1978). Only those persons who have been directly and personally affected by the actions of law enforcement officers have standing to challenge those actions. *Rakus v. Illinois*, 439 U.S. 128 (1978). Although *Rakus* involved standing under the Fourth Amendment, its principles are equally applicable here.

Finally, assuming that the motion was timely filed and defendants have standing, there was no showing that the use of the photographs may lead to "a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968); *Manson v. Brathwaite*, 432 U.S. 98, 111-16 (1977).

MOTION FOR APPOINTMENT OF INVESTIGATOR AT GOVERNMENT EXPENSE

The motion is denied. Defendants have failed to show sufficient need for the appointment of an investigator. *Smith v. Enomoto*, 615 F.2d 1251 (9th Cir. 1980).

Dated this 8th day of August, 1980.

/s/ James A. Redden
JAMES A. REDDEN
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CR 75-296

UNITED STATES OF AMERICA, PLAINTIFF

v.

KENNETH MOSES LOUD HAWK,
RUSS JAMES REDNER, ET AL., DEFENDANTS.

Portland, Oregon
May 12, 1976

TRANSCRIPT OF MOTION TO DISMISS

BEFORE:

The Honorable Robert C. Belloni, Chief Judge.

APPEARANCES:

Messrs. Sidney I. Lezak, United States Attorney, William W. Youngman and Charles H. Turner, Assistant United States Attorneys, appearing in behalf of the Government;

Messrs. Edward Jones and Ronald Schiffman, co-counsel for the defendant Loud Hawk;

Ms. Shelia Lea and Messrs. Lewis Gerwitz and Thomas Steenson, counsel for the defendant Redner;

Mr. Dennis Roberts, counsel for the defendant Dennis Banks;

Mr. Michael T. Bailey, counsel for the defendant Ka-Mook Banks.

(Wednesday, May 12, 1976, 9:30 o'clock a.m., Court convened and the following proceedings took place:)

THE COURT: This is the time set for the trial of United States of America versus Kenneth Moses Loud Hawk, Russ James Redner, Dennis James Banks, and Ka-Mook Banks. Are you ready for the Government?

MR. LEZAK: No, Your Honor, for the reasons stated in the memorandum filed with this Court yesterday, we are not.

* * * * *

THE COURT: All right. Well, I think everyone here realizes that this case will be dismissed against these defendants. Both this Court and the Court of Appeals has denied any postponement.

I am ready to try the case commencing today. Both parties have had ample time to prepare. The defendants are ready to go to trial. For some reason, which I do not understand, the Government is not, even though two of the counts are not even concerned with the subject of previously suppressed evidence. I do not want to dismiss this case without a trial. The factual and legal dispute should be heard and decided, but there is no way the Court can force the Government to call its witnesses. My only recourse is to dismiss the case against these four defendants.

Clearly, there has been unnecessary delay in bringing these four defendants to trial. Clearly, it's the fault of the Government.

The case—the indictment as to the four mentioned defendants is dismissed. All Court-imposed restrictions upon the activities of Mr. Loud Hawk, Mr. Redner, and Ka-Mook Banks are now removed. The bondsmen for all defendants are exonerated. The cash posted by Mr. Banks will be returned to him.

* * * * *

THE COURT: The exact nature of the dismissal is—it gives me some problems. There simply is not much law on the nature of this dismissal. But it does seem to me that there should be no further proceedings based upon the alleged occurrence stated in this indictment unless the Court of Appeals for the Ninth Circuit decides that my order to suppress was erroneous and remands the case to this Court for trial.

Inasmuch as I have power to do so, this dismissal of the indictment is with prejudice, unless the Ninth Circuit decides otherwise and remands the case or some part of it for trial.

* * * * *

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Criminal No. 75-296

UNITED STATES OF AMERICA, PLAINTIFF

v.

KENNETH MOSES LOUD HAWK,
RUSS JAMES REDNER, ET AL., DEFENDANTS.

[Filed Mar. 31, 1976]

ORDER SUPPRESSING EVIDENCE

FACTS (for the purposes of this motion only)

The defendants were arrested at approximately 10:00 p.m. November 14, 1975, near Ontario, Oregon following the stop of a station wagon and a motor home in which they were traveling. In the afternoon of November 15, pursuant to search warrants obtained subsequent to the arrests, Oregon State Police officers discovered what appeared to be seven cases of Dupont Gelex 2-70% dynamite in the rear of the station wagon. That same evening, Lt. McCullum, an Oregon State Police officer, notified Officer William Fettig, an Oregon State Police bomb expert, and

directed him to proceed to Ontario and dispose of the dynamite.

Officer Fettig arrived in Ontario in the afternoon of November 16. He found the station wagon located in a commercial towing garage where it had been placed sometime between the time of the arrests and his arrival. Officer Fettig transferred the dynamite and other explosives components including electrical wiring and blasting caps into the trunk of his car. He placed these materials on blankets and drove them to a pistol range about 5 miles from Ontario.

Once at the pistol range, Officer Fettig removed wrappers from two sticks of dynamite in each of the seven cases. He scraped off as much residue from the wrappers as he could and handed them over to an agent of the FBI. He then detonated a total of four sticks of dynamite. Following these detonations, he burned the remaining dynamite as well as the cardboard boxes and plastic bags in which the dynamite had been contained. After the burned residue had cooled, the Oregon State Highway Department, at Officer Fettig's request, performed clean-up operations.

From the time of Officer Fettig's arrival in Ontario to the burning of the dynamite, FBI and Oregon State Police photographers were taking still pictures of each step of the above proceedings. At no time were any of the defendants or their representatives or any neutral persons such as members of the press either present at or informed of the sequence of events outlined above until after they had already occurred.

The defendants have moved to suppress any and all evidence relating to the destroyed dynamite. They contend that the destruction of this evidence consti-

tutes a denial of due process in that no opportunity for defense analysis of the substance is now possible and the destruction was carried out before the defendants had any chance to object or suggest alternatives.

The government argues that: the dynamite, manufactured in 1973, could have been as much as three years old; two of the cardboard boxes of dynamite were water-soaked; and no one could be sure of what conditions this dynamite had been subjected to in those three years. Under these conditions, the government argues that it was reasonable to destroy this dangerous explosive in order to preserve the public safety.

The following are some of the factors on which I now base my decision on this motion.

FACTORS

Dynamite, in any form, is a dangerous substance that should only be handled and stored by experts. Explosives of any type should be disposed of when they become so unstable or sensitive as to be unpredictable in their detonation characteristics. Disposal of explosives in this condition is in the public interest and that factor would weigh heavily against any claim of prejudice by the destruction.

The destruction in this case occurred without notice to or presence of the defendants or their representatives or any neutral persons. All those present were law enforcement officers. The destruction took place before defendants were appointed counsel. The dynamite had been stored for nearly two full days before its destruction. There has been no evidence presented to me showing why it could not have been

stored until defense counsel could have been appointed or retained.

The Oregon State Police did not have adequate facilities in which to store this dynamite. The uncontradicted testimony is, however, that commercial storage magazines are located in Baker and Pendleton, Oregon and Boise, Idaho in which this dynamite could have been stored. Baker is only about 60 miles from Ontario. Experts for both the defendants and the government agree that there existed no reason why the dynamite could not have been transported and stored in one of these magazines with relative safety.

Officer Fettig destroyed the dynamite pursuant to instructions from his superior, Lt. McCullum. Lt. McCullum was not in court to testify as to his reasons for such instructions. Without such testimony, the only evidence presented was that the dynamite was no more dangerous or sensitive than "normal" dynamite and that the water-soaked sticks were less sensitive, if anything, than "normal" dynamite.

The boxes and plastic bags which contained the dynamite were also destroyed. The Oregon State Police, while attempting to take fingerprints from the outside of the station wagon, did not do the same with either the cardboard boxes or the plastic bags. Two of the defendants, Dennis Banks and Ka-Mook Banks, were not traveling in the vehicle in which the dynamite was found although they are charged with its possession. The destruction of these articles eliminated the possibility that they could have presented evidence rebutting this charge: i.e. they might have been able to show that their fingerprints were not on the dynamite containers.

CONCLUSION

Balancing the possible prejudice to the defendants against the government's reasons for the destruction, I must find in favor of the defendants. Because of this destruction, it is impossible for the defendants to show that they have been prejudiced but neither can the possibility of such prejudice be rebutted. In this situation, a presumption of such prejudice is created. This presumption, however, can be outweighed by valid reasons for the kind of destruction that took place here.

On several occasions, this Circuit has warned law enforcement officers against the intentional and negligent destruction of evidence. Apparently, these warnings have gone unheeded.[1] The officers and agents

[1] In *United States v. Heiden*, 508 F.2d 898 (9th Cir. 1974), officers had destroyed contraband following their customary practice but kept a representative sample. Judge Wallace, for the Court, wrote in footnote 1, page 903:

> The government is flirting with danger of reversal any time evidence is lost or inadvertantly destroyed. When evidence is seized, the government should take every reasonable precaution to preserve it. Saving only 24 kilo bricks from large marijuana seizures is, under ordinary circumstances, neither unreasonable nor illogical. Procedures should be instituted, however, that will prevent the type of destruction of evidence as occurred in this case.
>
> * * *

Judge Merrill, with the concurrence of Judge Peckham, then wrote:

> I concur in Judge Wallace's opinion but wish to lend emphasis to his warning in footnote 1. Cases will arise where the contraband destroyed does have potential usefulness as evidence not possessed by the sample retained. When this occurs and destruction is shown to have been prejudicial, reversal is called for. I would say that the practice apparently followed in the Southern District invites reversal. I would urge that it be halted; that destruction of evidence follow only after petition and order directed to the particular items to be destroyed with notice to the defendant and opportunity to petition for access to that which has been seized.

In that case, at least a sample of the contraband was preserved. Here, none was saved. Even the wrappers were scraped clean.

who were present at and who conducted the destruction of the dynamite and its containers were experienced personnel. They must have known how sensitive this case would become and how material this evidence was to the case. There was no evidence that the destruction in this case was in bad faith, but lack of bad faith does not give the government a license to destroy evidence without some accountability. It was the government who caused the presumption of prejudice in this case. Without a showing of some reasoning behind the government's conduct, that presumption has not been rebutted.

Defendants' Motion to Suppress all evidence, tangible and intangible, relating to the Dupont 70% dynamite is granted.

Dated this 30th day of March, 1976.

/s/ Robert C. Belloni
United States District Judge

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3067

DC CV 75-296 JAR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, aka KAMOOK BANKS, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Portland District of Oregon

[Filed Jan. 18, 1985]

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the PORTLAND District of OREGON and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the

judgment of the said District Court in this Cause be, and hereby is affirmed.

Jan. 16, 1985

A TRUE COPY
ATTEST

PHILLIP B. WINBERRY
Clerk of Court

by /s/ Joseph Williams
Deputy Clerk

Filed and entered August 30, 1984

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT COURT

No. 83-3067

UNITED STATES OF AMERICA, APPELLANT

v.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, A/K/A KAMOOK BANKS, APPELLEES

[Filed Jan. 8, 1985]

ORDER

BEFORE: WALLACE AND CANBY, CIRCUIT JUDGES AND CRAIG*, DISTRICT JUDGE

A majority of the panel as constituted above has voted to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Walter Early Craig, Senior United States District Judge for the District of Arizona, sitting by designation.

APPENDIX L

CHRONOLOGY OF PROCEEDINGS

11/14/75	Respondents apprehended (D. Banks arrested 1/26/76)
12/22/75	Superseding indictment returned
3/31/76	Suppression motion granted (Gov't appeals)
5/12/76	Indictment dismissed (Gov't appeals)
10/15/76	Appeal argued and submitted
7/26/77	Court of appeals (panel) affirms
10/17/77	Rehearing en banc granted
3/6/78	Limited remand
8/23/78	District court issues findings of fact
8/7/79	Court of appeals (en banc) reverses and remands
10/1/79	Respondents' rehearing petition denied
3/3/80	Respondents' certiorari petition denied (Mandate issued 3/12/80)
5/12/80	District court orders new indictment
6/18/80	Superseding indictment returned
8/8/80	Indictment dismissed (KaMook Banks only) (Other respondents and gov't appeal)
1/7/81	Appeals argued and submitted
7/29/82	Court of appeals reverses as to KaMook Banks and dismisses as to the other respondents
10/5/82	Respondents' rehearing petition denied
1/10/83	Respondents' certiorari petition denied (Mandate issued 1/31/83)
5/20/83	Indictment dismissed for violation of Speedy Trial Clause (Gov't appeals)
1/4/84	Appeal argued and submitted
8/30/84	Court of appeals affirms
1/8/85	Government's rehearing petition denied

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